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IN THE
Supreme Court of the United States

DENISE MITTEN,

Petitioner,

v.

MARK LaCHAPELLE, VALERIE OHANIAN
and L.M.K.O.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Citizens have a fundamental right to travel, which includes migrating, resettling and starting a new life. Parents have a fundamental right to decide upon the proper care and upbringing of their children. Here, a court required a mother to live in a seven-county area in order to facilitate visitation with her daughter by the child's noncustodial father and a third party. If she did not relocate to the state, she would lose sole physical custody. The court never found that the mother's decision to reside elsewhere would cause her child substantial harm. Rather, it found that the restriction was in the child's best interest. Did this violate the mother's constitutional rights?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iv
Table of Appendices	vii
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case	2
A. Factual History Prior to Court Intervention — Mitten Gives Birth	2
B. LaChapelle Files Suit to Vacate L.M.K.O.'s Adoption and Obtain Parental Rights	4
C. Ohanian Files Suit to Obtain Custody	4
D. The Trial Court Conditions Mitten's Physical Custody of Her Daughter on Moving Back to Minnesota	5
E. How the Federal Question Was Presented	7

Contents

	Page
Reasons for Granting the Writ	8
1. The Issue Presented Is Of Exceptional National Importance Because It Affects A Large Number Of American Families And Because It Implicates Fundamental Constitutional Rights	8
2. Even Though State Courts Acknowledge That Fundamental Rights Are Involved, They Apply Conflicting Standards	18
Conclusion	20

TABLE OF CITED AUTHORITIES

Page

Cases:

Burgess v. Burgess, 913 P.2d 473 (Cal. 1996) 18

Harder v. Harder, 524 N.W.2d 325 (Neb. 1994) .. 18

In Re Burgess, 913 P.2d 473 (1991) 16

In re Custody of D.M.G. and T.J.G., 951 P.2d 1377 (Mont. 1998) 18

In re Marriage of Francis, 919 P.2d 776 (Colo. 1996), *reh'g denied*, July 29, 1996 18

Jaramillo v. Jaramillo, 823 P.2d 299 (N.M. 1991) 18

McAlister v. Patterson, 299 S.E.2d 322 (S.C. 1982) 18

Meyer v. Nebraska, 262 U.S. 390 (1923) 11

Parham v. J.R., 442 U.S. 584 (1993) 12

Saenz v. Roe, 526 U.S. 489 (1999) 11, 13

Shapiro v. Thompson, 394 U.S. 618 (1969) 9, 11, 14

Stanley v. Illinois, 405 U.S. 645 (1972) 11

Cited Authorities

Page

Stevison v. Woods, 560 So. 2d 176 (Miss. 1990) .. 18

Troxel v. Granville, __ U.S.__ , __, 120 S. Ct. 2054 (2000) 11, 12, 13

Watt v. Watt, 971 P.2d 608 (Wyo. 1999) 15, 16, 19

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28 U.S.C. § 1257(a) 1

Minn. Stat. § 518.17, subd. 3(a) (1998) 1

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Cited Authorities

Page

Janet Leach Richards, *Children's Rights v. Parents' Rights: A Proposed Solution to the Custodial Relocation Conundrum*, 29 N.M. L. Rev. 24 (1999) 18

Anne L. Spitzer, *Moving and Storage of Postdivorce Children: Relocation, The Constitution and The Courts*, 1985 Ariz. St. L.J. 1 (1985) 9, 19

U.S. Census Bureau; "Households and Family Characteristics: March 1998 (Update)" Table 10, http://www.census.gov/prod/3/98pubs/p20-515u.pdf (accessed: July 29, 2000) 9

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The Court Of Appeals Of The State Of Minnesota Dated And Filed March 14, 2000 ..... 1a

Appendix B — Findings Of Fact, Conclusions Of Law And Order For Judgment Of The District Court For The Fourth Judicial District Of The State Of Minnesota, County Of Hennepin Dated June 3, 1999 ..... 33a

Appendix C — Order Of The Supreme Court Of The State Of Minnesota Denying Petition For Further Review Dated And Filed May 16, 2000 ..... 82a

Appendix D — Order Of The Supreme Court Of The State Of Minnesota Denying Motion To Suspend Minn. R. Civ. App. P. 140.01 Dated June 27, 2000 ..... 84a

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Minnesota (App. A, *infra*, 1a to 32a) is reported at *LaChapelle v. Mitten*, 607 N.W.2d 151 (Minn. Ct. App. 2000). The order of the Supreme Court of Minnesota denying review dated May 16, 2000 (App. C, *infra*, 82a to 83a) is unreported. The order denying suspension of the Minnesota court rules in order to allow reconsideration of the denial of review (App. D, *infra*, 84a to 85a) is unreported. The findings of fact, conclusions of law and order for judgment of the District Court for the Fourth Judicial District of the State of Minnesota, File No. PA 33665, (App. B, *infra*, 33a to 81a) is also unreported.

STATEMENT OF JURISDICTION

The Minnesota Supreme Court entered its order denying review on May 16, 2000. It then entered an order denying suspension of the Minnesota court rules in order to allow reconsideration of the denial of review on June 27, 2000. Jurisdiction is based upon 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Minn. Stat. § 518.17, subd. 3(a) (1998) provides that

> [u]pon adjudging the nullity of a marriage, or in a dissolution or separation proceeding, or in a child custody proceeding, the court shall make such further order as it deems just and proper concerning:
>
> (1) the legal custody of the minor children of the parties which shall be sole or joint;

(2) their physical custody and residence; and

(3) their support. In determining custody, the court shall consider the best interests of each child and shall not prefer one parent over the other solely on the basis of the sex of the parent.

STATEMENT OF THE CASE

The question Denise Mitten proposes for review can be best understood in the context of the following relevant facts:

A. Factual History Prior to Court Intervention — Mitten Gives Birth

Denise Mitten gave birth to her only child, L.M.K.O., on January 4, 1993. Prior to the birth, she and her partner, Valerie Ohanion, had discussed the possibility of Mitten having a child, and in early 1990 Mitten decided to have the baby via artificial insemination. Rather than choose an anonymous donor, however, she decided to use a known donor in order to conceive her child. By using a known donor, Mitten hoped to avoid certain health risks that were associated with sperm banks, but more importantly, she wanted to be able to have access to the donor in case there were ever any health problems that required knowing the father's genetic background.

In December 1990 a mutual friend introduced Mitten to Mark LaChapelle. LaChapelle was interested in becoming a sperm donor, and he was willing to donate the semen for the artificial insemination. As part of their deal, LaChapelle consented in writing to waive all parental rights. In return, Mitten agreed that she would not hold LaChapelle legally or

financially responsible for the child. After entering into the agreement, it took about two years for Mitten to become pregnant. Finally, in April of 1992 she learned that she would have her baby.

Prior to the birth, Mitten agreed to sign a second contract. It confirmed that she and Ohanian would be the child's parents. It also allowed LaChapelle and Scott Brush (his life partner) to visit the child and have a relationship with her. Nonetheless, under the second agreement, Mitten and Ohanian retained both legal and physical custody of the child, and all decisions regarding how she should be raised were left to these two individuals.

On January 4, 1993, Mitten gave birth to L.M.K.O. The birth certificate lists Mitten as her mother, but the space for her father's name is blank. Following the birth, Mitten and Ohanian asked the Minnesota courts to allow Ohanian to adopt L.M.K.O as a step-parent. Their petition for adoption listed the father as "artificial insemination," and the adoption took place in September of 1993.

LaChapelle was aware of the adoption, and after it took place he visited with L.M.K.O. for about a year-and-a-half. During this time, tensions between the parties began to rise based upon their disagreements on LaChapelle's role in L.M.K.O.'s life. Then, on September 4, 1994 LaChapelle announced that he would be initiating a paternity action. During the meeting where he made this announcement, the parties agreed that it would be best if he stopped visiting with L.M.K.O. during the litigation.

B. LaChapelle Files Suit to Vacate L.M.K.O.'s Adoption and Obtain Parental Rights

LaChapelle filed a motion asking the Minnesota court to vacate L.M.K.O.'s adoption in September of 1994. Eleven months later, the court granted the motion. The order, which was signed in August 1995, gave Mitten sole legal and physical custody of her daughter, and it allowed LaChapelle to file an affidavit with the state's Department of Vital Statistics if he wished to retain his parental rights. Later that same month, LaChapelle did just that. In addition, he filed a paternity action with the Minnesota state court.

C. Ohanian Files Suit to Obtain Custody

During the legal battle with LaChapelle, Mitten and Ohanian ended their 11-year relationship. This occurred in the spring of 1996. Mitten, who had quit her job in order to be a stay-at-home-mom, began to look for work, and she eventually found a position in Hersey, Michigan. Prior to moving, she asked the trial court to allow her to live in Michigan with L.M.K.O., and it was at this point that Ohanian got involved and petitioned the court for joint legal and physical custody of Mitten's daughter.

After receiving permission to move from the court in October 1996, Mitten and her daughter went to Michigan as planned.[1] After living there for about a year, Mitten changed jobs and began working at Ferris State University as a part time instructor. She also worked part time as a counselor in the university's women's center. This arrangement allowed

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1. In addition to allowing the move, the trial court granted Ohanian's motion to consolidate her action with LaChapelle's.

her to synchronize her schedule with L.M.K.O.'s school schedule, and it minimized the time L.M.K.O. spent in daycare.

About six months after Mitten and her daughter moved, the trial court set up a visitation schedule under which both LaChapelle and Ohanian could spend time with L.M.K.O. Under the plan, the two would fly to Michigan one month and spend several days visiting. The next month L.M.K.O. would travel to Minnesota and do the same. This plan was in place for approximately two years.

D. The Trial Court Conditions Mitten's Physical Custody of Her Daughter on Moving Back to Minnesota

In June 1997 the trial court determined that LaChapelle was L.M.K.O.'s biological father, and later that year it ordered him to pay child support and other expenses. Mitten retained custody of her daughter, and the two continued to build a life in Michigan. Then, in February 1998 the case went to trial. Prior to trial LaChapelle dropped his claim for joint custody, and Mitten consented to allow him to take part in L.M.K.O.'s upbringing. The parties also agreed that Mitten and Ohanian would share joint legal custody.[2]

The court awarded Mitten sole physical custody of her daughter. But it conditioned the award on L.M.K.O.'s return to Minnesota. According to the court, "it [was] in [L.M.K.O.'s] best interest that she live within the seven

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2. This was the finding of the trial court. However, on appeal Mitten argued that there was no such agreement since she was coerced into agreeing to it. The appeals court upheld the factual finding of the trial court. (App. A, *infra*, 11a-12a, 14a).

county metropolitan area of the Twin Cities . . ."[3] In its decision, the trial court never found that living in Michigan with her mother would harm L.M.K.O or endanger her in any way. Rather, the court required L.M.K.O. to live in Minnesota based purely upon its determination that if she lived there she could maintain a relationship with Mitten, LaChapelle and Ohanian.[4]

In addition to restricting L.M.K.O.'s residence, the trial court also engineered a visitation schedule for her to follow upon her return to Minnesota. The plan obligates L.M.K.O. to spend two weekends per month with Ohanian and one weekend per month with LaChapelle. The scheme also requires the child to have one weeknight visit each week. The visit is alternated between these same two individuals.[5] Holidays are split between Mitten and Ohanian/LaChapelle.

On appeal, the state's appellate court affirmed the district court's decision. In doing, so, it determined that a trial court has the authority to restrict L.M.K.O's residence even though in reality this also restricts Mitten's residence. According to the appellate court, "[a]ny burden on Mitten's right to travel arises from her desire to remain L.M.K.O.'s sole physical custodian."[6] The appeals court also determined that any interference in Mitten's right to raise her children was

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3. App. B, *infra*, 52a.

4. App. B, *infra*, 21a, 81a.

5. App. B, *infra*, 57a-58a.

6. App. A, *infra*, 21a.

justified by "Minnesota's interest in protecting L.M.K.O.'s best interest."[7]

Following the decision by the Court of Appeals, the Supreme Court of Minnesota denied further review.[8] One month later it denied Mitten's request that it suspend its rules in order to allow for reconsideration of that decision.[9]

E. How the Federal Question Was Presented

Denise Mitten presents this case to the Court in order to determine whether Minnesota violated her constitutional rights by limiting her right to travel and by interfering in the choices she made as a parent. She initially raised this issue in her brief to the trial court. She also raised it in her brief to the Minnesota Court of Appeals, and the court addresses the issue in its decision. It recognized that Mitten had a right to travel and a fundamental interest in the "care, custody, and management" of her daughter.[10] Nevertheless, it determined that the state's interest in protecting the best interests of L.M.K.O. trumped these rights.[11]

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7. App. A, *infra*, 22a.

8. App. C, *infra*, 82a-83a.

9. App. C, *infra*, 84a-85a.

10. App. A, *infra*, 18a.

11. App. A, *infra*, 18a-23a.

REASONS FOR GRANTING THE WRIT

As noted in the question presented, Denise Mitten asks this Court to determine whether Minnesota violated her constitutional rights. More specifically, did the state court overstep its bounds by interfering with her right to travel and her right to decide upon the proper upbringing of her child? There are two reasons to grant Mitten's petition:

1. The issue presented for review is of exceptional national importance because it affects a large number of American families and because it implicates fundamental constitutional rights; and

2. Even though state courts acknowledge that constitutional rights are involved, they apply conflicting standards when confronting relocation issues.

1. THE ISSUE PRESENTED IS OF EXCEPTIONAL NATIONAL IMPORTANCE BECAUSE IT AFFECTS A LARGE NUMBER OF AMERICAN FAMILIES AND BECAUSE IT IMPLICATES FUNDAMENTAL CONSTITUTIONAL RIGHTS

Between March 1998 and March 1999, 42.6 million Americans moved. This represents 15.6% of the population, or about one in six people.[12] This figure is astounding. It says that Americans are a mobile society. But more, it reflects how much our right to travel — the right "to migrate, to

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12. Carol S. Faber, "Current Population Reports, Geographical Mobility (Update)" http://www.census.gov/ prod/2000pubs/p20-531.pdf (U.S. Census Bureau, June 2000).

resettle and to start a new life"[13] — is engrained in our way of living.

Parents who have physical custody of their children as a result of divorce or separation are no different than other Americans. They are part of our mobile society. Approximately 5.1 million single parents with children under 18 head households resulting from divorce or separation.[14] These parents move for the same reasons other people move: to follow their careers, or to start new ones; to further their education; to follow employment opportunities of a spouse; and to start new families. Many want to return to old lives with family and friends. Some just want to start over.[15] One source estimates that "[w]ithin four years of separation or divorce, seventy-five percent of custodial mothers move at least once; of that number over one-half move again."[16]

The purpose in pointing out these figures is to show that when courts begin telling single parents where they can and

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13. *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969).

14. U.S. Census Bureau; "Households and Family Characteristics: March 1998 (Update)" Table 10, http://www.census.gov/prod/3/98pubs/p20-515u.pdf (accessed: July 29, 2000). This figure does not include parents who do not head the household in which they live. For example, a divorced mother with children who moves back with her parents would not be included.

15. *See* Carol S. Bruch and Janet M. Bowermaster, *The Relocation of Children and Custodial Parents: Public Policy, Past and Present*, 30 Fam. L.Q. 245, 248 (1996); Anne L. Spitzer, *Moving and Storage of Postdivorce Children: Relocation, The Constitution and The Courts*, 1985 Ariz. St. L.J. 1, 75 (1985).

16. *Id.* at 3.

cannot live, they affect the constitutional rights of hundreds of thousands of American citizens. As a result, this Court should confront the issue of when a state may constitutionally restrict a custodial parent's choice to move and when it may not. This issue goes to the core of daily living: the family. Thus, it is an issue of exceptional national importance — one that is to date unaddressed by constitutional jurisprudence.

Denise Mitten's case serves as a good example of how state courts ignore constitutional rights when they invade the family sphere and try to engineer plans that they think are in the best interests of someone else's child. The Minnesota court first allowed Mitten and her daughter to move to Michigan and start a new life. Then, after trial, it uprooted the family and demanded that they move back to Minnesota in order to facilitate visitation with the child's sperm donor father and a third party that the court called an "emotional parent."[17]

Absent from the trial court's decision is any indication that living in Michigan would be detrimental to L.M.K.O. To the contrary, by all accounts she was secure and stable there. And what about Mitten? The court forced her to leave her life, her job and her friends in Michigan in order to return to an area she did not want to live — all because it felt that L.M.K.O. should have what it called "meaning[ful], positive parental relationships with each of her three parents."[18] Under this rationale, however, no divorced or separated parent (or at least very few) would ever be permitted to move,

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17. App. C, *infra*, 16a.

18. App. C, *infra*, 15a

because keeping the parents together, the antithesis of divorce, would always be ideal for the child.

American citizens have a constitutional right to travel between states.[19] This includes the right "to migrate, resettle, find a new job, and start a new life . . ."[20] Here, Denise Mitten's right to travel was abridged because she was told that unless she moved her family back to Minnesota and remained in a seven-county radius, she would lose her daughter. Consequently, the decision judicially coerces Mitten into foregoing her constitutional right to remain in Michigan and continue her new life.

The decision also abridges Mitten's rights as a parent. Several cases decided by this Court recognize that parents possess a fundamental constitutional right to direct the upbringing of their children.[21] Most recently, in *Troxel v. Granville*, the Court stated that "[t]he liberty interest . . . of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court."[22] Thus, by telling Mitten that she and L.M.K.O. would have to reside in Minnesota, the state was also interfering in Mitten's constitutional right to decide on her daughter's upbringing.

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19. *See Saenz v. Roe*, 526 U.S. 489, 498-501 (1999).

20. *Shapiro*, 394 U.S. at 629.

21. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

22. *Troxel v. Granville*, __ U.S.__ , __, 120 S. Ct. 2054, 2060 (2000).

The Minnesota Court of Appeals recognized that its decision implicated Denise Mitten's rights as a parent. As a result, it applied strict scrutiny to her case.[23] In doing so, it determined that the state had a compelling interest in looking out for the best interests of children.[24] In the court's words, "Minnesota's interest in protecting L.M.K.O.'s best interests [was] compelling and justifie[d] intrusion into Mitten's privacy in her familial relationship with L.M.K.O."[25]

However, the responsibility for looking after L.M.K.O.'s best interest was Mitten's. As her mother and the parent with whom she resided all her life, Mitten was in the best position to judge her child's best interests. No other party was in the same position as Mitten. LaChapelle never lived with his daughter, and Ohanian is only a third party, not a parent. As pointed out by this Court in *Parham v. J.R.*,[26] "the natural bonds of affection lead parents to act in the best interests of their children." Thus, unless a parent is unfit (i.e., endangers the child in some way), that parent's decisions should not be second-guessed by the government. The court's opinion in *Troxel* reaches a similar conclusion:

> There is a presumption that fit parents will act in the best interests of their children . . . [a]ccordingly, so long as a parent adequately cares for his or her children (i.e., is fit), there will

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23. App. A, *infra*, 18a.

24. App. A, *infra*, 19a.

25. App. A, *infra*, 22a.

26. 442 U.S. 584, 602-603 (1993).

> normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.[27]

In addition to finding that the state's interest in looking after the best interests of children supersedes the rights of parents, the appeals court decision also implies that this goal trumps Mitten's right to travel. Beyond this, it indicated that the right was only incidentally affected. According to the court, "[a]ny burden on Mitten's right to travel ar[ose] from her desire to remain L.M.K.O.'s sole physical custodian." Therefore, according to the appeals court, the trial judge did not really limit Mitten's constitutional rights. She was free to reside anywhere she chose.[28]

There can be no doubt that Minnesota threatened Mitten with a penalty if she did not move back to the state and set up residence. The penalty was harsh: the loss of her child. In *Saenz v. Roe*, this Court indicated that before a state may penalize the right to travel, it must demonstrate a compelling governmental interest for doing so.[29] It is difficult to think of a harsher penalty for a parent than the one threatened here. While the court portrayed the burden on Mitten as incidental, this is not true. What the state really did was penalize Mitten if she chose to exercise her constitutional right. To do so, the trial court judge employed the cruelest weapon

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27. *Id.* at __, 120 S. Ct. at 2061 (citation omitted).

28. (App. A, *infra*, 21a).

29. 526 U.S. at 499.

imaginable: the threat of taking a child away from a loving parent. This is a penalty, pure and simple, and it is impermissible absent a compelling governmental interest.[30]

The compelling governmental objective suggested by Minnesota was a state's alleged interest in looking after the best interests of children. The best interest objective sounds compelling. After all, who could be against looking out for the best interests of children? It would appear to be an admirable objective for the state. Closer scrutiny, however, is revealing.

Critics describe the best interest standard as vague, speculative and arbitrary.[31] Moreover, the term is conclusory. There may be times when what would be in a child's best interest would be compelling. Then again, there would be times when this would not be true. For example, the state would serve a compelling interest in protecting a child from abuse or neglect. This is hardly debatable. However, it may be in a child's best interest to have new clothes, or receive a college education, or live in a bigger house, or eat more vegetables. Nonetheless, it unlikely that any state would begin ordering parents to provide these things even though they might be in a particular child's best interest. There would simply be no compelling basis to justify state intrusion.

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30. *Cf.*, *Shapiro*, 394 U.S. at 634 ("... any classification which serves to penalize the exercise of that right [to travel], unless shown to be necessary to promote a compelling governmental interest is unconstitutional.").

31. *See* Arthur B. LaFrance, *Child Custody and Relocation: A Constitutional Perspective*, 34 U. Louisville J. Fam. L. 1, 42-46 (1995-96).

Thus, in deciding whether a particular state interest is compelling, the "best interest of the child" label serves very little purpose. Instead, this Court should look deeper. The real goal should be protecting children. This is the position of the Supreme Court of Wyoming. In *Watt v. Watt*,[32] Wyoming's top court stated that a judge should not second-guess a custodial parent's choice of residence unless there was clear evidence that the move would have a detrimental effect upon the children. It also stated that the term detrimental encompassed more than the stress associated with the move or the difficulties inherent in the geographic distance between the parents.[33]

Where a parent's constitutional rights are implicated, requiring a showing that there be detriment to the child as a prerequisite to state involvement makes sense. Under the alternative (the best interest approach), courts begin to micromanage the family and the decisions made by parents. A best interest approach often leads to state involvement absent a compelling justification; thus, it injects the state into everyday decision making by the parent. In quoting a passage from the Supreme Court of California, the Washington Supreme Court stressed this point:

> As this case demonstrates, ours is an increasingly mobile society. *Amici curiae* point out that approximately one American in five changes residences each year. Economic necessity and remarriage account for the bulk of relocations. Because of the ordinary needs for both parents after a marital dissolution to secure or retain

32. 971 P.2d 608, 616 (1999).

33. *Id.*

> employment, pursue educational or career opportunities, or reside in the same location as a new spouse or other family or friends, it is unrealistic to assume that divorced parents will permanently remain in the same location after dissolution or to exert pressure on them to do so. It would also undermine the interest in minimizing costly litigation over custody and require the trial courts to "micromanage" family decisionmaking by second-guessing reasons for everyday decisions about career and family.[34]

A noted scholar looking at the issue agrees with *Watt*. In his article on the constitutional implications of child relocation, Professor Arthur B. LaFrance advocates using an endangerment standard. He states that a "custodial parent should be permitted to decide where he or she and the child will reside, and that decision should be second guessed only where it would present 'clear danger to the child's well-being.' "[35] "Endangerment, [the] article concludes, is the only legitimate state interest so compelling that it may prevent a custodial mother from relocating with her children."[36]

Here, the trial court never found that living in Michigan would harm or endanger L.M.K.O. Rather, without stating

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34. 971 P.2d at 616 (*quoting In Re Burgess*, 913 P.2d 473, 480-481 (1991)).

35. LaFrance, *supra*, n.31 at 138, 157.

36. *Id.* at 138; *see also* Bruch & Bowermaster, *supra*, n.13, at 302-303 (finding that restraints on moving should only be imposed if the noncustodial parent proves that the relocation will prejudice the child's welfare and that changing custody will be less harmful than the relocation).

exactly why, it found that living near LaChapelle and Ohanian would be in her best interest because it would allow her to have relationships with all three of her so-called "parents."[37] Based upon this determination, the trial court judge felt free to limit Denise Mitten's residence and second-guess the decision she made about where to raise her family. This was unconstitutional because, again, there was no evidence that Mitten's decision to live in another state was detrimental to L.M.K.O.

While this case is about Denise Mitten, the issues transcend her single interest and those of the other parties. By taking this case, the C[illegible]rill have the opportunity to protect the rights of countless single-parents across the country. The message would be simple: family courts should not second-guess a parent's decision where to raise his or her child — and thereby infringe upon the parent's right to travel — unless the determination is detrimental to the child's welfare. Then, and only then, would a court be permitted to intervene. Absent this, custodial parents should be free, just like other citizens, to raise their families as they see fit.

It is difficult to imagine issues that are more important than those impacting the parents and children of this country. This is an issue of exceptional importance. Consequently, Denise Mitten asks the Court to grant her petition for writ of certiorari.

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37. App. C, *infra*, 51a.

2. EVEN THOUGH STATE COURTS ACKNOWLEDGE THAT FUNDAMENTAL RIGHTS ARE INVOLVED, THEY APPLY CONFLICTING STANDARDS

The second basis for granting Denise Mitten's petition goes hand-in-hand with the first: important constitutional issues are involved, and there is conflict among the states. Some states agree with Minnesota and follow a best interest approach.[38] In other words, they assume that there is a compelling state interest in looking after the best interest of children, and they apply the standard in order to determine whether to allow the custodial parent to move (or in some cases remain) out of state. However, even among these states, there is confusion. Some states have a presumption in favor of relocation; some have a presumption against relocation; and some have no presumption at all.[39]

The greatest conflict is between the states that apply the best interest approach and those that require a showing of detriment to the child before restricting the custodial parent's right to move.[40] As pointed out earlier, Wyoming takes the latter

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38. *See, e.g., In re Custody of D.M.G. and T.J.G.*, 951 P.2d 1377 (Mont. 1998); *Harder v. Harder*, 524 N.W.2d 325 (Neb. 1994).

39. *E.g., Burgess v. Burgess*, 913 P.2d 473 (Cal. 1996) (presumption in favor of remaining with custodial parent); *McAlister v. Patterson*, 299 S.E.2d 322 (S.C. 1982) (presumption against relocation); *Jaramillo v. Jaramillo*, 823 P.2d 299 (N.M. 1991) (no presumption when parents have joint legal custody); *see also*, Janet Leach Richards, *Children's Rights v. Parents' Rights: A Proposed Solution to the Custodial Relocation Conundrum*, 29 N.M. L. Rev. 24, 247-251 (1999) (collecting cases which show that application of the best interest standard varies from state to state.).

40. *See, e.g., In re Marriage of Francis*, 919 P.2d 776 (Colo. 1996), *reh'g denied*, July 29, 1996 (applying an endangerment standard in sole custody cases based upon Colorado statute); *Stevison v. Woods*, 560 So. 2d 176 (Miss. 1990).

approach. It is also the only state to do so that confronts the constitutional question head-on. It held that "[t]he right of travel enjoyed by a citizen carries with it the right of a custodial parent to have the children move with that parent."[41] In addition, the decision states that the parent's right to travel "is not to be denied, impaired, or disparaged unless clear evidence . . . demonstrates another substantial change in circumstances and establishes the detrimental effect of the move upon the children."[42]

Many states dealing with relocation either ignore or duck the constitutional questions relating to parental rights and the right to travel.[43] In fact, those who write about the problem suggest that guidance from the Supreme Court is necessary because "[c]onstitutional analysis resolves confusion within any given state and offers consistency by articulating a single, national standard."[44] This is a common sense approach, because if a federal constitutional right is at issue, all states should provide minimum uniform protection of that right.

A decision in this area by the United States Supreme Court would go a long way toward clarifying under what

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41. 971 P.2d at 615-16.

42. *Id.* at 616.

43. *See, e.g.*, Spitzer, *supra*, n.36 at 3, 10, 18-31 (pointing out how court and legislatures ignore the custodial parent's right to travel); LaFrance, *supra*, 31 at 3 (". . . state appellate courts decide relocation cases virtually without reference to this constitutional jurisprudence, an anomaly which has largely escaped judicial and scholarly analysis.").

44. *Id.* at 8.

conditions a court may tell a parent where to live and under what circumstances it may second-guess a custodial parent's decision where to raise his or her children. Thus, by granting Denise Mitten's petition for writ of certiorari, the Court could establish much-needed precedent for the states to follow.

CONCLUSION

For many, parenting goes to the core of daily living. It is difficult to imagine issues that are more important than those relating to how parents raise their children. The issue presented for review is of exceptional importance. Denise Mitten asks the Court to do two things: (1) protect her right to determine where to raise her child; and (2) protect her right to travel. The State of Minnesota failed to recognize these fundamental rights, and it impermissibly invaded the family sphere. By taking this case, the Court can mark out a constitutional boundary and forbid government intrusion into these two areas absent the most compelling of circumstances. In addition, by granting certiorari, the court can provide much-needed constitutional guidance to state courts on the issue of child relocation.

For all these reasons, Denise Mitten respectfully asks that her petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE COURT OF APPEALS OF THE STATE OF MINNESOTA DATED AND FILED MARCH 14, 2000

STATE OF MINNESOTA
IN COURT OF APPEALS
C5-99-1304

In Re the Matter of:
Mark LaChapelle, petitioner,

Respondent,

vs.

Denise Mitten,

Appellant,

In Re the Custody of:
L.M.K.O.,

Valerie Ohanian, petitioner,

Respondent,

and

Denise Mitten,

Appellant,

and

Mark LaChapelle,

Respondent.

Appendix A

Filed March 14, 2000
Affirmed; motion for fees denied;
motion to strike granted in part
Shumaker, Judge

Hennepin County District Court
File No. PA33665

* * *

Considered and decided by Halbrooks, Presiding Judge, Lansing, Judge, and Shumaker, Judge.

SYLLABUS

1. When it is in the child's best interests, the trial court has the authority to restrict the child's residence even though the custodial parent's residence is thereby incidentally restricted. Such a restriction on a child's residence does not violate a custodial parent's constitutional right to travel and reside in the state of the parent's choice, or the parent's right to privacy. Nor does the restriction deny equal protection under the federal or Minnesota constitutions.

2. The language of Minn. Stat. § 518.156, subd. 1(b) (1998) does not preclude a mother's ex-partner, who is not a parent, from seeking joint custody of the mother's child.

3. If it is in the best interests of a child, the trial court may award joint legal custody of the child to the child's mother and the mother's ex-partner, even though the mother's ex-partner is not the child's parent and neither of the child's parents are unfit.

4. Because Minn. Stat. § 257.69, subd. 2 (Supp. 1999) does not require consideration of parties' financial status in apportioning litigation-related costs, the trial court did not abuse its discretion in equally apportioning litigation-related costs where all contributing parties received equal benefits from the expenditures.

5. Mother's failure to submit information on her current expenses is fatal to her request for attorney fees on appeal under Minn. Stat. § 518.14, subd. 1 (1998).

OPINION

SHUMAKER, Judge

Appellant Denise Mitten gave birth to a child as a result of artificial insemination from sperm donated by respondent Mark LaChapelle. Mitten and her partner, respondent Valerie Ohanian, agreed with LaChapelle and his partner as to custody and visitation of the child. When Mitten and Ohanian severed LaChapelle's visitation with the child, LaChapelle commenced paternity proceedings. When Mitten and Ohanian later terminated their relationship, the parties commenced various proceedings to determine custody and visitation rights.

After trial, the court determined physical and legal custody, visitation rights, and financial issues, and denied Mitten's motion to change the child's surname.

On appeal, Mitten contends that the court abused its discretion by granting her sole physical custody on the

condition that she and the child reside in Minnesota, granting joint legal custody to her and Ohanian, apportioning trial fees equally among the parties, requiring her to pay certain travel expenses for visitation, refusing to award additional past child support, and denying her motion to change the child's surname. We hold that the trial court did not abuse its discretion as to its awards and determinations. Therefore, we affirm.

FACTS

Mitten and Ohanian were lesbian partners. LaChapelle was in a gay partnership with another man. The four met in 1990 to discuss the possibility of conceiving and raising a child. They agreed in writing that LaChapelle would donate sperm for the artificial insemination of Mitten, that LaChapelle would have no parental rights, and that Mitten would not hold him responsible for the child. Mitten became pregnant in April 1992.

In May 1992, the four signed another agreement stating that Mitten and Ohanian would have physical and legal custody of the child and LaChapelle and his partner would be entitled to a "significant relationship" with the child. The child, L.M.K.O., was born January 4, 1993.

After L.M.K.O.'s birth, Mitten and Ohanian petitioned for adoption. On the petition they identified the father as "artificial insemination" and did not inform the court of the donor's identity or of the parties' various agreements. The court granted the adoption in September 1993.

Appendix A

LaChapelle visited L.M.K.O. regularly until August 1994, when Mitten and Ohanian terminated visitation. LaChapelle then moved the court to vacate the adoption, alleging fraud on the court for failure to disclose the parties' agreements. The court vacated the adoption. In August 1995, LaChapelle filed an affidavit with the court stating his intention to retain parental rights. He then filed a petition to adjudicate paternity. The court granted Mitten temporary custody of L.M.K.O.

Mitten and Ohanian ended their relationship in the spring of 1996. Later, Mitten requested the court's permission to move with L.M.K.O. to Michigan for employment reasons. At the same time, Ohanian petitioned for custody. The court granted Mitten's request pending further proceedings, ordered blood tests in the paternity action, and granted Ohanian's motion to consolidate her custody petition with LaChapelle's paternity petition.

Mitten moved to Michigan with L.M.K.O. in October 1996. The court granted visitation rights to Ohanian and LaChapelle while L.M.K.O. was in Michigan. One month they would fly to Michigan and visit with L.M.K.O. for three or four days. The next month L.M.K.O. would fly to Minnesota to visit them.

The court adjudicated LaChapelle to be L.M.K.O.'s biological father in June 1997, but allowed Mitten to retain interim custody. The court then ordered a custody and visitation evaluation, joined L.M.K.O. in the action, and appointed a guardian ad litem for her. In November 1997, the court ordered LaChapelle to pay past and future child support.

Appendix A

After a trial in February 1999, the court awarded sole physical custody of L.M.K.O. to Mitten on the condition that Mitten provide a permanent residence for L.M.K.O. in Minnesota. The court found that the parties had agreed before trial that Mitten and Ohanian would have joint legal custody of L.M.K.O., and the court ruled that such custody was in L.M.K.O.'s best interests. The court made awards of visitation, child support, and expenses for the daycare, medical, and dental needs of L.M.K.O.; denied Mitten's request to change L.M.K.O.'s surname; and apportioned trial fees evenly among the parties.

Mitten appeals the grant of joint legal custody, conditional sole physical custody, the final awards, and the denial of the name change. She seeks need-based attorney fees and moves to strike parts of Ohanian's brief and appendix.

ISSUES

1. Did the trial court err in finding that Ohanian had standing to seek custody of L.M.K.O.?

2. Did the trial court abuse its discretion in granting joint legal custody to Mitten and Ohanian?

3. Did the trial court abuse its discretion in conditioning the grant of sole physical custody to Mitten on her moving back to Minnesota from Michigan?

4. Did the trial court abuse its discretion in evenly apportioning trial costs among the three parties?

5. Did the trial court abuse its discretion in requiring Mitten to pay visitation expenses for L.M.K.O. to visit LaChapelle and Ohanian in Minnesota?

6. Did the trial court abuse its discretion in refusing to grant Mitten additional past child support?

7. Did the trial court abuse its discretion in refusing to change L.M.K.O.'s surname upon Mitten's motion?

8. Is Mitten entitled to attorney fees on appeal?

9. Should this court grant Mitten's motion to strike portions of Ohanian's brief and appendix?

ANALYSIS

The court's "paramount commitment" in all matters involving court-established relationships of a child is the best interests of the child. ***Olson v. Olson***, 534 N.W.2d 547, 549 (Minn. 1995). "The trial court has broad discretion to determine matters of custody." ***Durkin v. Hinich***, 442 N.W.2d 148, 151 (Minn. 1989). Review of custody determinations "is limited to whether the trial court abused its discretion by making findings unsupported by the evidence or by improperly applying the law." ***Pikula v. Pikula***, 374 N.W.2d 705, 710 (Minn. 1985). "The trial court's findings must be sustained unless clearly erroneous." ***Id.***

1. Standing of a non-parent

Mitten argues that Ohanian does not have standing to seek custody of L.M.K.O. because: (1) Minn. Stat. § 518.156

(1998), which permits custody petitions by a third person, does not apply here because chapter 518 is the Marriage Dissolution Act, and here there was no marriage; and (2) therefore Ohanian would have had to bring her petition for custody under chapter 257, the Parentage Act, which speaks only to biological mothers and father. Because Ohanian is not a biological mother, Mitten argues, she has no standing under Minnesota law to seek custody of L.M.K.O.

Standing to seek custody under chapter 518 is conferred by Minn. Stat § 518.156. ***See In re Custody of E.A.Q.D.***, 405 N.W.2d 262, 264 (Minn. App. 1987) (addressing standing to seek custody under Minn. Stat. § 518.156). Under the statute, a custody proceeding may be commenced "by a person other than a parent" under certain circumstances. Therefore, the fact that Ohanian is not L.M.K.O.'s biological parent does not preclude her from seeking custody of L.M.K.O. The circumstances under which a non-parent may seek custody are defined as situations "where a decree of dissolution or legal separation has been entered or where none is sought[.]" Minn. Stat. § 518.156, subd. 1(b). Here, because the parties were not seeking a dissolution decree, Ohanian could start a custody proceeding "by filing a petition or motion seeking custody[.]" ***Id.*** Because this is what Ohanian did, the district court did not err in ruling that she had standing to seek custody.

The statute is clear on this point; therefore, we need not, and cannot, look beyond its plain language. ***See*** Minn. Stat. § 645.16 (1998) (stating "[w]hen the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded

under pretext of pursuing the spirit"); ***Phelps v. Commonwealth Land Title Ins. Co.***, 537 N.W.2d 271, 274 (Minn. 1995) (stating "[w]here the intention of the legislature is clearly manifested by plain unambiguous language * * * no construction [of the statute] is necessary or permitted"). Because this court is limited in its function to correcting errors it cannot create public policy. Thus, in the face of clear statutory language, Mitten's policy arguments must fail. ***See Sefkow v. Sefkow***, 427 N.W.2d 203, 210 (Minn. 1988) (reversing court of appeals, noting "[t]he function of the court of appeals is limited to identifying errors and then correcting them").[1] The wisdom of allowing non-parents to seek custody of a child is not relevant to whether such persons have standing to do so. ***See, e.g., Blanche v. 1995 Pontiac Grand Prix***, 599 N.W.2d 161, 169 (Minn. 1999) (Stringer, dissenting) (stating "[w]e have long recognized that '[c]ourts have nothing to do with the wisdom or expediency of statutes. The remedy for unwise or inexpedient legislation is political and not judicial' ") (quoting ***Hickok v. Margolis***, 221 Minn. 480, 485, 22 N.W.2d 850, 852 (1946)).[2]

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1. We note that the foreign cases Mitten cites are factually distinguishable, or based on qualitatively different custody statutes, or both.

2. We note the differences between Minn. Stat. § 518.156, subd. 1(b) and the Uniform Marriage and Divorce Act (UMDA), adopted by Minnesota, from which it was taken. UMDA § 401 provides:

> A child custody proceeding is commenced in the [____] court:
>
> (1) * * *

(Cont'd)

(Cont'd)

> (2) by a person other than a parent, by filing a petition for custody of the child in the [county, judicial district] in which he is permanently resident or found, *but only if he is not in the physical custody of one of his parents.*

UMDA (U.L.A.) § 401 (1998) (emphasis added). The comment to section 401 provides that:

> [s]ubsection (d) makes an important distinction between custody disputes commenced by parents and those commenced by some other person interested in a particular child. * * * [S]ubsection (d)(2) makes it clear that if one of the parents has physical custody of the child, a non-parent may not bring an action to contest that parent's right to continuing custody under the "best interest of the child" standard of Section 402. If a non-parent * * * wants to acquire custody, he must commence proceedings under the far more stringent standards for intervention provided in the typical Juvenile Court Act. In short, this subsection has been devised to protect "parental rights" of custodial parents and to insure that intrusion upon those rights will occur only when the care the parent is providing the child falls short of the minimum standard imposed by the community at large — the standard incorporated in the neglect or delinquency definitions of the state's Juvenile Court Act.

UMDA (U.L.A.) § 401 comm. While not commenting on the reasons for nor the wisdom of such differences, we note that Minn. Stat. § 518.156, subd. 1(b) allows for a much broader range of circumstances under which a non-parent has standing to seek custody of a child than does the UMDA.

Appendix A

2. Joint legal custody

The trial court found that Mitten, Ohanian, and LaChapelle came to an agreement regarding joint legal custody prior to trial. The court also found joint legal custody to be in L.M.K.O.'s best interests. On appeal, Mitten argues that she was coerced into agreeing to joint legal custody.

On appeal, a trial court's findings must be sustained unless clearly erroneous. ***Pikula***, 374 N.W.2d at 710. A finding is "clearly erroneous" if the reviewing court is " 'left with the definite and firm conviction that a mistake has been made.' " ***Fletcher v. St. Paul Pioneer Press***, 589 N.W.2d 96, 101 (Minn. 1999) (quoting ***Gjovik v. Strope***, 401 N.W.2d 664, 667 (Minn. 1987)). When determining whether findings are clearly erroneous, an appellate court views the record in the light most favorable to the trial court's findings. ***Lossing v. Lossing***, 403 N.W.2d 688, 690 (Minn. App. 1987). Also, appellate courts defer to trial-court credibility determinations. ***Sefkow***, 427 N.W.2d at 210.

The record shows that prior to trial, Mitten, Ohanian, and LaChapelle each sought legal custody of L.M.K.O. During motions in limine before trial, Mitten's attorney stated on behalf of Mitten that "[s]he would accept joint legal custody with either [LaChapelle or Ohanian]." At a chambers conference with the trial court judge on the first day of trial, LaChapelle withdrew his demand for legal custody. At the beginning of trial, the court found that, based on the comments of Mitten's attorney at the motions hearing, on conference calls prior to trial between the attorneys and the court, and on LaChapelle's withdrawn demand for legal

custody, Ohanian and Mitten would agree to joint legal custody. Mitten admitted on cross-examination, "I agreed that I would share joint legal custody with her." We hold the record supports the trial court's finding.

The welfare of the child takes precedence even if a case involves an agreement. ***Moylan v. Moylan***, 384 N.W.2d 859, 865 (Minn. 1986) (citing ***Petersen v. Petersen***, 296 Minn. 147, 148, 206 N.W.2d 658, 659 (1973)). Parties cannot enter into an agreement that might be against the best interests of the child. ***Sydnes v. Sydnes***, 388 N.W.2d 3, 7 (Minn. App. 1986). Mitten argues that the trial court erred in granting joint legal custody to Ohanian because she and Ohanian do not have the ability to cooperate. Where a grant of joint legal custody is contemplated, the court must consider additional best-interests factors which relate to the parties' ability to cooperate in the raising of the child. Minn. Stat. § 518.17, subd. 2 (1998) (factors to be considered when joint legal custody is requested include the ability of potential joint custodians to cooperate). There is evidence in the record of the parties' inability to cooperate. However, there is also evidence that Mitten and Ohanian are willing to try to cooperate for L.M.K.O.'s sake, and that there are methods in place for resolving disputes that might arise. The trial court found that joint legal custody would be in L.M.K.O.'s best interests. The record supports the trial court's finding. ***See Wilson v. Moline***, 234 Minn. 174, 182, 47 N.W.2d 865, 870 (1951) (function of an appellate court "does not require us to discuss and review in detail the evidence for the purpose of demonstrating that it supports the trial court's findings[; our] duty is performed when we consider the evidence, as we have done here, and determine that it reasonably supports the findings").

Mitten also argues that a trial court cannot grant custody to a third party unless the biological parents are unfit, and in this case neither biological parent is unfit.[3] The record is unclear as to whether Mitten properly preserved this issue for appeal. ***See Thiele v. Stich***, 425 N.W.2d 580, 582 (Minn. 1988) (this court will not consider matters not argued and considered in the court below). In her post-trial memorandum to the trial court, Mitten stated that one "non-issue" was legal custody, as she and Ohanian had agreed they would be joint legal custodians of L.M.K.O. Mitten also stated in the summary to her memorandum that the trial court should "[a]ward joint legal custody of L.M.K.O. to Mitten and Ohanian." We assume, but do not concede, that Mitten has properly preserved the issue of granting custody to a non-parent for appeal.

Mitten argues that a trial court does not have the authority to grant joint legal custody to a non-parent when the biological parents are fit. The standard for granting custody to a non-parent over the objection of a biological parent was set out by the supreme court in ***Wallin v. Wallin***, 290 Minn. 261, 187 N.W.2d 627 (1971). When deciding custody disputes between a parent and third party, a biological parent is entitled to custody of his or her own

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3. Mitten presents this argument in terms of whether or not Ohanian, as a non-parent, has *standing* to seek custody of a child over the objection of a fit, biological parent. However, ***Wallin v. Wallin***, 290 Minn. 261, 187 N.W.2d 627 (1971), addresses the standard for awarding custody to a non-parent. As previously stated, under Minn. Stat. § 518.156, subd. 1(b), Ohanian has standing to seek custody. We therefore consider Mitten's argument here under the award of joint legal custody.

child "unless it clearly appears that she is unfit or has abandoned her right to custody, or unless there are some extraordinary circumstances which would require that she be deprived of custody." ***Id.*** at 264, 187 N.W.2d at 629. However, the best interests of the child is the primary test to be applied in awarding custody. ***Id.*** The first requirement in applying the ***Wallin*** standard is that there be a "dispute" as to custody between a parent and a non-parent. ***See In re Custody of N.M.O.***, 399 N.W.2d 700, 702 (Minn. App. 1987) (when deciding custody "disputes" between a parent and a third person, ***Wallin*** standard applies). The trial court found that Mitten did not dispute joint legal custody with Ohanian. In her post-trial memorandum, Mitten stated that joint legal custody with Ohanian was a "non-issue." The trial court found that Mitten and Ohanian agreed to share legal custody of L.M.K.O. We hold the evidence supports the court's finding. Therefore, at trial, there was not, in fact, a "dispute" between Mitten and Ohanian as to legal custody of L.M.K.O.

Even were we to find that ***Wallin*** does, in fact, apply in this case, it is clear to us that ***Wallin*** has been satisfied. By agreeing to share legal custody with Ohanian, Mitten functionally "abandoned her right to [sole legal] custody" under the first prong of ***Wallin***. 290 Minn. at 264, 187 N.W.2d at 629. In addition, the trial court found it to be in the best interest of L.M.K.O. for Mitten and Ohanian to share legal custody. The record supports the court's findings. ***See N.M.O.***, 399 N.W.2d at 703 (best interests of the child is always the overriding consideration in custody decisions).

Finally, Mitten argues that in granting joint legal custody to her and Ohanian and in giving LaChapelle all the rights

of a joint legal custodian as well, the trial court created an impermissible "triumvirate" parenting scheme. ***See*** Minn. Stat. § 518.17, subd. 3(b) (1998) (rights to be granted to each party in a custody decree regardless of custody). The trial court found that the parties had agreed that LaChapelle would drop his demand for legal custody of L.M.K.O.; Mitten and Ohanian would share joint legal custody; and LaChapelle would have various rights to the child. Any rights LaChapelle has under the agreement with Mitten and Ohanian are not those of a joint legal custodian. Therefore, we reject Mitten's argument that the court created, in effect, three legal custodians.

3. Conditional physical custody

Mitten argues that the trial court abused its discretion in conditioning physical custody on her moving her residence from Michigan to Minnesota. She argues that (1) the trial court had already granted her permission to move permanently to Michigan with L.M.K.O.; (2) the court had no authority to make a conditional grant of physical custody; and (3) conditional physical custody violates the Minnesota and United States Constitutions.

a. Order allowing Mitten to move to Michigan with L.M.K.O.

Minn. Stat. § 518.131 (1998) allows the court, in a custody proceeding, to grant temporary custody to one parent pending the final disposition of the proceeding. Minn. Stat. § 518.131, subd. 1. Unless otherwise altered, a temporary order remains in effect until entry of a final decree and a

temporary order "[s]hall not prejudice the rights of the parties or the child which are to be adjudicated at subsequent hearings in the proceeding." Minn. Stat. § 518.131, subd. 5, 9(a).

By order dated August 30, 1996, the trial court granted Mitten's "motion for permission to move her permanent residence to Hersey, Michigan." Mitten argues that the order was not a temporary order. In its memorandum following the grant of Mitten's motion, however, the trial court specifically stated that "Mitten agrees that she is still subject to this Court's jurisdiction." The trial court based its decision to allow Mitten to move to Michigan on Minn. Stat. § 518.131. Similarly, in the court's June 12, 1997 order adjudicating paternity, the court stated that prior orders awarding Mitten custody had been interim orders. We hold that the court intended the order allowing Mitten to move to be a temporary order. Even if the August 1996 order was ambiguous about whether it was temporary or permanent, that ambiguity was resolved against Mitten in the June 1997 order by the same judge who issued the earlier order. We defer to a district court's interpretation of its own order. ***See Mikoda v. Mikoda***, 413 N.W.2d 238, 242 (Minn. App. 1987) (trial court's construction of its own decree given "great weight" on appeal).

b. Authority for granting conditional custody

Mitten argues that the trial court did not have authority to grant conditional physical custody. In determining custody, the trial court must issue a custody order determining legal custody, physical custody and residence,

and support based on the best interests of the child. Minn. Stat. § 518.17, subd. 3 (1998).

In an initial custody proceeding, a trial court treats a proposed change of residence by a party as one factor to balance in determining custody of a child. ***Stangel v. Stangel***, 355 N.W.2d 489, 490 (Minn. App. 1984), ***review denied*** (Minn. Feb. 6, 1985). A proposed change of residence bears directly on several of the best-interests factors in section 518.17. The factors stressing stability and continuity of care are of particular importance in light of a parent's proposed move to another state. Also important are the intimacy of the relationships between each parent and the child; the interaction of the child with parents and other people who affect the child's best interests; the child's adjustment to home, school, and community; and the permanence, as a family unit, of the existing or proposed custodial home. Minn. Stat. § 518.17, subd. 1(a)(4), (5), (6), (7), and (8) (1998).

Here, the trial court's findings indicate that Mitten's change of residence was but one factor in the court's best-interests analysis. The trial court, applying the correct standard, found it would be in L.M.K.O.'s best interests to live in the Twin Cities metropolitan area. The court also found it would be in her best interests for Mitten to remain her sole physical custodian if Mitten lived in Minnesota. Viewing the record in the light most favorable to the trial court's findings, those findings are supported by the evidence. The lack of statutory authority explicitly allowing conditional custody awards does not preclude such an award when it is in the child's best interest. ***See DeLa Rosa v. DeLa***

Rosa, 309 N.W.2d 755, 758 (Minn. 1981) (in family cases, the district court has inherent power to grant relief as facts and equities require).

c. Constitutionality of conditional custody

Mitten argues that conditioning sole physical custody on her returning to Minnesota violates her rights of travel, privacy, and equal protection under the Minnesota and United States Constitutions. We disagree.

> The right to travel is inherent in the concept of our country as a federal union; hence the right to travel is a fundamental constitutional right under the federal constitution.

Mitchell v. Steffen, 504 N.W.2d 198, 200 (Minn. 1993). The right to travel includes the right to "live and settle down anywhere one chooses in this country without being disadvantaged because of that choice." ***Id.*** at 201. The nature of the disadvantage or hardship involved is important to the level of review a restriction on the right to travel receives. ***Id.*** at 202. In this case, the hardship imposed on Mitten is the loss of sole physical custody of her daughter if she does not return to Minnesota. This implicates the fundamental right to raise one's child, which triggers the application of strict scrutiny. ***See Stanley v. Illinois***, 405 U.S. 645, 651, 92 S. Ct. 1208, 1212 (1972) (fundamental interest of a parent in the companionship, care, custody, and management of children).

The deprivation of fundamental rights is subject to strict scrutiny and may only be upheld if justified by a compelling

state interest. ***Carey v. Population Servs. Int'l***, 431 U.S. 678, 97 S. Ct. 2010 (1977). The compelling state interest in this case is the protection of the best interests of the child. ***See In re Welfare of M.P.***, 542 N.W.2d 71, 74 (Minn. App. 1996) ("[T]he paramount nature of a child's best interests is a principle that has been part of Minnesota child welfare law for at least 100 years.") (citing ***In re Welfare of J.J.B.***, 390 N.W.2d 274, 279 (Minn. 1986) (noting that best interests doctrine "has long been recognized as the common thread in cases determining * * * the circumstances in which children are required to live" and adopting best interests doctrine "as a paramount consideration" in termination of parental rights cases)), and ***State ex rel. Flint v. Flint***, 63 Minn. 187, 189, 65 N.W. 272, 272 (1895) (stating that, in a custody dispute, in spite of other considerations, including application of statutory law, "[t]he paramount question was * * * what would be most for the benefit of the infant"). While no cases in Minnesota have decided whether the best interests of the child is a state interest compelling enough to allow burdening a parent's fundamental right to travel, other states have so found.

Particularly relevant to this case is the Supreme Court of Montana's recent decision in ***In re Custody of D.M.G. and T.J.G.***, 951 P.2d 1377 (Mont. 1998). A couple who had never married lived together in Montana and had two children together. ***Id.*** at 1379. Their relationship ended two years after their children were born, and the children resided with the mother. ***Id.*** The mother moved with the children to Oregon, where her family resided. ***Id.*** The trial court concluded it was in the children's best interests that both parents reside in Montana and granted the mother custody if she returned

to Montana. ***Id.*** at 1380. The Montana Supreme Court found that

> [t]he case at bar * * * involves a situation where the court is effectively requiring that the children's primary residential custodian move to Montana from another state where the custodian had already established her home and the children's home prior to the initial custody determination and prior to the relocation issue being raised. * * * [W]e conclude that the instant fact situation may impact the constitutional right of interstate travel to an even greater extent than would the facts in our previously decided cases [where parties' and children's home is in Montana at the time custody is first determined].

Id. at 1382-83. The court also stated that

> [Mother's] constitutional right of interstate travel is qualified by the special obligations of custody, the state's interest in protecting the best interests of the children and by the competing interests of the non-custodial parent.

Id. at 1381. The Montana court ultimately held that furtherance of the best interests of children may constitute a compelling state interest worthy of reasonable interference with a parent's right to travel, but the parent requesting the travel restriction must provide sufficient proof that a restriction is in the best interests of the child. In that case, the father had not done so. ***Id.*** at 1383. ***See also Clark v.***

Atkins, 489 N.E.2d 90, 100 (Ind. Ct. App. 1986) (holding grant of custody to mother on condition she return to Indiana does not impose burden on right to travel, because (1) she remains free to go where she chooses, (2) it is only the children who must be returned to Indiana, and (3) the law has few objectives more compelling than protecting the interests of children); ***Ziegler v. Ziegler***, 691 P.2d 773, 780 (Idaho Ct. App. 1985) (court cites with approval district court decision finding that "[p]roviding and assuring the maximum opportunities for parental love, guidance, support and companionship is a compelling state interest that * * * warrants reasonable interference with the constitutional right of travel"); ***Carlson v. Carlson***, 661 P.2d 833, 836 (Kan. Ct. App. 1983) ("Her right to travel or even to establish residence elsewhere is limited only by her desire to retain her status as the custodial parent.").

Here the trial court specifically found that it would be in L.M.K.O.'s best interests to reside in Minnesota where she could maintain a relationship with Mitten as her biological mother and Ohanian as her "emotional parent," and LaChapelle as her biological father. The trial court used the term "emotional parent" in its order to refer to a person L.M.K.O. looks to for comfort, solace, and security. As in ***Clark***, the trial court did not restrict Mitten's right to remain in Michigan; the court only required L.M.K.O. to be returned to Minnesota. Any burden on Mitten's right to travel arises from her desire to remain L.M.K.O.'s sole physical custodian.

The United States Supreme Court has recognized a general freedom from governmental intrusion in child-rearing

decisions. ***In re Petition of Santoro***, 578 N.W.2d 369, 374 (Minn. App. 1998) (citing ***Moore v. City of East Cleveland***, 431 U.S. 494, 97 S. Ct. 1932 (1977); ***Wisconsin v. Yoder***, 406 U.S. 205, 92 S. Ct. 1526 (1972); and ***Meyer v. Nebraska***, 262 U.S. 390, 43 S. Ct. 625 (1923)), ***reversed on other grounds***, 594 N.W.2d 174 (Minn. 1999). There is a constitutional right to familial privacy, but the right is not absolute. ***R.S. v. State***, 459 N.W.2d 680, 689 (Minn. 1990). When there is an allegation of interference by the state with a protected right of privacy, the court must balance the interest in the privacy against the state's need to intrude on that privacy. ***Id.*** Minnesota's interest in protecting L.M.K.O.'s best interests is compelling and justifies intrusion into Mitten's privacy in her familial relationship with L.M.K.O.

Finally, Mitten argues that an arrangement that obliges the biological mother to move to a place she does not want to live for the convenience of the child's father and one other important adult in the child's life offends the equal protection clauses of the Minnesota and United States Constitutions. But the trial court did not require Mitten to move her home at all; it simply required L.M.K.O. to be brought back to Minnesota. The court based its decision on L.M.K.O.'s best interests, not on the convenience of the parties. Specifically, the court stated

> [n]either Mitten's desire to live in rural Michigan nor the convenience and expense incurred by LaChapelle and Ohanian in visiting [L.M.K.O.] there are the primary factors with which this Court bases its decision. Instead, this Court looks at

> [L.M.K.O.]'s best interest in deciding how custody, visitation, and her residency can provide meaning [sic], positive, parental relationships with each of her three parents.

The equal protection guarantees prevent the government from making distinctions among people when applying the law unless the distinction serves a legitimate governmental interest. ***R.B. v. C.S.***, 536 N.W.2d 634, 637 (Minn. App. 1995). In Minnesota, custody decisions are based on the best interests of the child. The focus in applying the best-interests standard is on the child, not the parents, and therefore the standard applies equally to all parents. ***See Carlson***, 661 P.2d at 836-37 (rejecting mother's argument that a residency restriction in the custody decree is a violation of equal protection because a similar restriction was not placed on father, because the best-interests-of-the-child standard applies to both parents).

4. Trial costs

> The court may order expert witness and guardian ad litem fees and other costs of the trial and pretrial proceedings, including appropriate tests, to be paid by the parties in proportions and at times determined by the court.

Minn. Stat. § 257.69, subd. 2 (Supp. 1999). An award of expenses at trial is a matter in the court's discretion and will not reversed on appeal absent an abuse of that discretion. ***J.L.B. v. T.E.B.***, 474 N.W.2d 599, 605 (Minn. App. 1991), ***review denied*** (Minn. Oct. 11, 1991).

Mitten argues that, because of the disparity in their incomes, the trial court abused its discretion in apportioning the costs of the guardian ad litem, the custody evaluator, and the psychologist/parenting consultant equally among herself, Ohanian, and LaChapelle. We disagree. Minn. Stat. § 257.69, subd. 2, does not require the trial court to consider a party's ability to pay before ordering the party to pay trial costs. The parties received equal services from the experts and the guardian ad litem and may be required to pay accordingly. The trial court did not abuse its discretion in awarding trial expenses.

5. Visitation expenses

Mitten argues that the trial court abused its discretion in requiring her to pay costs associated with transporting L.M.K.O. to Minnesota every other month for visitation with Ohanian and LaChapelle.

The trial court's discretion in deciding visitation questions is extensive and will not be reversed absent an abuse of discretion. ***Al-Zouhayli v. Al-Zouhayli***, 486 N.W.2d 10, 12 (Minn. App. 1992). The trial court considered visitation issues when Mitten requested permission to move with L.M.K.O. to Michigan. Specifically, in its June 12, 1997 order, it found "[t]he Court is mindful of the fact that Mitten chose to move with L.M.K.O. to Michigan, knowing that visitation with Ohanian and LaChapelle would need to occur." The court required Mitten to pay costs associated with transporting L.M.K.O. to Minnesota every other month to visit Ohanian and LaChapelle and required Ohanian and LaChapelle to pay all costs associated with visiting L.M.K.O.

in Michigan. The court found the division of visitation costs fair, and we see no abuse of discretion.

6. Past child support

Mitten argues that the trial court abused its discretion in not awarding her past child support beginning with the date of L.M.K.O.'s birth, and in refusing to apply an increase in child support retroactively to the date of her motion.

> The court shall limit the parent's liability for past support of the child to the proportion of the expenses that the court deems just, which were incurred in the two years immediately preceding the commencement of the action.

Minn. Stat. § 257.66, subd. 4 (1998). We review a trial court's past-support determinations under an abuse of discretion standard. ***McNeal v. Swain***, 477 N.W.2d 531, 533-34 (Minn. App. 1991). When determining what amount of past support is just, a court must consider the earnings, needs, and resources of the obligor, obligee, and child. ***Id.*** at 534. "The current and past income of the obligor, along with the past needs of the child, must be considered." ***Id.*** A court must make particularized findings. ***Id.***

The trial court issued an order in June 1997 ordering LaChapelle to pay child support to Mitten. In August 1997, Mitten brought a motion for past child support beginning with the date of L.M.K.O.'s birth. On November 10, 1997, the trial court awarded Mitten past child support, but only starting on June 1, 1997, not the date of L.M.K.O.'s birth, stating:

Appendix A

> Given the procedural history and the unique and unusual facts of this case, the Court deems it just to award retroactive child support, including health insurance and day care, to June 1, 1997.

Mitten argues that the court's refusal to award past support beginning with the date of L.M.K.O.'s birth was an abuse of discretion.

In August 1998, Mitten made a motion to increase LaChapelle's child-support obligation. The trial court deferred the issue until trial. At trial, Mitten requested that the increased child support be made retroactive to the date of her motion. The trial court refused, finding that "[g]iven the unique circumstances of this case, it would not be fair and reasonable to award child support arrearages dating back to August 13, 1998." Mitten argues that the court abused its discretion.

In initially deciding Mitten's motion for past support the court considered the income and obligations of Mitten, LaChapelle, and L.M.K.O., as required. ***Id.*** The court made the required particularized findings. Because we agree with the trial court that this case is unique, both procedurally and factually, we see no abuse of discretion in the trial court's original award of past support or in its refusal to award arrearages back to the date of Mitten's motion for increased child support.

7. Name change

Mitten argues that the trial court abused its discretion in refusing to change L.M.K.O.'s surname from Ohanian to

Mitten. A trial court must grant an application for a change in a minor child's name unless the court finds the change is not in the best interests of the child. Minn. Stat. § 259.11(a) (1998). "When granting or denying a petition for a name change, the court must set forth clear and compelling reasons for its decision." ***In re Welfare of C.M.G.***, 516 N.W.2d 555, 561 (Minn. App. 1994). In determining the child's best interests, the court may consider, but is not limited to: (1) how long the child has had the current name; (2) any potential harassment or embarrassment the change might cause; (3) the child's preference; (4) the effect of the change on the child's relationship with each parent; and (5) the degree of community respect associated with the present and proposed names. ***In re Saxton***, 309 N.W.2d 298, 301 (Minn. 1981).

> "[J]udicial discretion in ordering a change of a minor's surname against the objection of one parent should be exercised with great caution and only where the evidence is clear and compelling that the substantial welfare of the child necessitates such change."

Id. (quoting ***Robinson v. Hansel***, 302 Minn. 34, 36, 223 N.W.2d 138, 140 (1974)). Both Ohanian and LaChapelle objected to changing L.M.K.O.'s surname.

Mitten argues that it is in L.M.K.O.'s best interests to change her surname because it is currently a name that is neither her mother's nor her father's, but that of a genetic stranger. The trial court found that Ohanian is an "emotional parent" to L.M.K.O. Mitten also argues that L.M.K.O.'s name should be changed because it will save her the

embarrassment of having to explain why she has a name that is neither her mother's nor her father's and because societal norms dictate that a child have either her mother or father's surname, rather than the surname of a third person.

The trial court found that L.M.K.O. needs and has a sense of community in her full name, and keeping it the same will enhance her identity and will not add any more confusion to her sense of who her family is. The court also found that L.M.K.O.'s current name is important for her relationship with each of her parents because it contains a family name from LaChapelle's family and contains both Mitten's and Ohanian's surnames. L.M.K.O. has been known by her current name for six years. On the facts of this case, six years is long enough for the child to have developed a sense of identity through her name. ***See Id.*** at 302 (due deference is given to the fact that the child has borne a given surname for an extended period of time). In addition, the custody evaluator recommended that L.M.K.O.'s name remain the same. The court found it in L.M.K.O.'s best interests not to change her name. We find no abuse of discretion.

8. Attorney fees

Mitten has moved for attorney fees for her costs relating to this appeal. Fees may be awarded at any time in the proceedings. Minn. Stat. § 518.14, subd. 1 (1998). An appellate court may allow suitable attorney fees and necessary disbursements on appeal. ***Wilson v. Wilson***, 229 Minn. 126, 130, 38 N.W.2d 154, 157 (1949). The award of fees on appeal lies within the discretion of this court. ***Katz v. Katz***, 408 N.W.2d 835, 840 (Minn. 1987). Minn. Stat.

§ 518.14 (1998) provides that, for cases brought under chapter 518, a court shall award attorney fees necessary to enable a party to carry on a proceeding provided: (1) the fees are necessary for the good-faith assertion of the party's rights; (2) the party from whom the fees are sought has the means to pay them; and (3) the party seeking fees does not have the means to pay them. Minn. Stat. § 518.14, subd. 1.

Ohanian's petition for custody, consolidated with LaChapelle's petition to adjudicate paternity, was brought under chapter 518. Therefore, this case qualifies as one brought under chapter 518.

Mitten argues that she had to bring this appeal or risk losing custody of her daughter in order to remain in her home in Michigan. She claims that because she has been forced to leave her home in Michigan and quit her job there and has not found employment in Minnesota, her income has dropped substantially. Mitten provides a brief summary of her sources of income but no evidence of her current expenses. Because Mitten has disclosed interest income she is receiving on "principals," but not the identity or value of the "principals" themselves, and because she has not provided this court with evidence of her expenses, she has failed to demonstrate her inability to pay her own attorney fees, as required by Minn. Stat. § 518.14, subd. 1(3). ***See Gales v. Gales***, 553 N.W.2d 416, 423 (Minn. 1996) (refusing to award need-based attorney fees on appeal because party seeking fees did not provide court with current information on her income and expenses).

Furthermore, the parties contributed to the protraction of this custody dispute. Mitten and Ohanian initially brought

a fraudulent adoption proceeding before the trial court. When the court later vacated the fraudulent adoption and LaChapelle petitioned for an adjudication of paternity, Mitten denied his paternity. Mitten and Ohanian agreed before L.M.K.O. was born that Ohanian would have equivalent rights regarding the child. Mitten was ordered to return L.M.K.O. to Minnesota by September 1, 1999, yet made little or no effort to find a job pending resolution of this appeal. She incurred additional expenses bringing a motion to stay the trial court's order pending appeal and then in appealing the court's denial of the motion. ***See Dabrowski v. Dabrowski***, 477 N.W.2d 761, 766 (Minn. App. 1991) (stating "fee awards under Minn. Stat. § 518.14 may be based on the impact a party's behavior has had on the costs of litigation regardless of the relative financial resources of the parties"). Ohanian and LaChapelle have incurred their own expenses in responding to Mitten's motions and appeals.

Mitten's request for attorney fees is denied.

9. Motion to strike

Mitten has moved to strike portions of Ohanian's appellate brief. She seeks to strike Appendix B, their "Partnership Agreement," on the ground that it is not a part of the record.

> An appellate court may not base its decision on matters outside the record on appeal, and may not consider matters not produced and received into evidence below.

Thiele, 425 N.W.2d at 582-83. Counsel for all three parties agreed at trial that the custody-evaluator's report would be submitted into evidence in its entirety. The evaluation included a copy of the Partnership Agreement as an attachment. Therefore, Appendix B was part of the record and may be considered by this court on appeal.

Mitten also seeks to strike Appendix H, an affidavit of Ohanian responding to Mitten's motion to stay the trial court's order pending resolution by this court, and footnote 20, relating actions taken by Mitten since the trial court's order was issued. Ohanian does not oppose Mitten's motion concerning Appendix H and footnote 20.[4] In addition, the affidavit and events described in footnote 20 occurred after the entry of the trial court's judgment and decree, from which this appeal is taken, and therefore constitute matters outside the record, which this court will not consider. ***Id.*** We grant Mitten's motion to strike Appendix H and footnote 20.

DECISION

We affirm the trial court's judgment and decree granting Mitten sole physical custody on the condition that she move back to Minnesota from Michigan and granting Mitten and Ohanian joint legal custody with LaChapelle to have the right to participate in important decisions affecting L.M.K.O. We also affirm the trial court's decisions on trial costs, past child

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4. In Ohanian's memorandum in opposition to Mitten's motion to strike, she asks this court to consider Appendix H and footnote 20 only if we consider the post-decree evidence in Mitten's brief. By order dated November 12, 1999, this court decided not to consider the post-decree evidence in Mitten's brief.

support, and visitation expenses. We affirm the trial court's decision not to grant Mitten's request to change L.M.K.O.'s surname. We deny Mitten's motion for attorney fees on appeal. We grant in part and deny in part Mitten's motion to strike portions of Ohanian's brief and appendix.

Affirmed; motion for fees denied; motion to strike granted in part.

s/ Gordon Shumaker
3/8/00

APPENDIX B — FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT OF THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF THE STATE OF MINNESOTA, COUNTY OF HENNEPIN DATED JUNE 3, 1999

DISTRICT COURT
FOURTH JUDICIAL DISTRICT
STATE OF MINNESOTA
COUNTY OF HENNEPIN

File No. PA 33665

In Re the Matter of:

Mark LaChapelle,

Petitioner,

and

Denise Mitten

Respondent.

In Re the Custody of:

Lauren Mitten Katherine Ohanian

Valerie Ohanian,

Petitioner,

and

Appendix B

Denise Mitten,

Respondent,

and

Mark LaChapelle,

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT

The above-entitled matter came on for trial on February 1, 2, and 3, 1999 before the Honorable Philip D. Bush, Judge of District Court.

Mary Madden appeared on behalf of Petitioner Mark LaChapelle, who also was present. Christopher Johnson appeared on behalf of Petitioner Valerie Ohanian, who also was present. Gary Weissman and Susan Rhode appeared on behalf of Respondent Denise Mitten, who also was present. Roseanne Nathanson appeared as the guardian ad litem on behalf of the minor child, Lauren Mitten Katherine Ohanian.

Following the trial, Mary Madden and Christopher Johnson submitted a joint proposed Findings of Fact, Conclusions of Law, and Order on behalf of Petitioner Mark LaChapelle and Petitioner Valerie Ohanian. In addition, on behalf of Petitioner Mark LaChapelle, Mary Madden submitted a letter brief dated March 5, 1999; on behalf of Petitioner Valerie Ohanian, Christopher Johnson submitted

a letter brief dated March 5, 1999. On behalf of Respondent Denise Mitten, Gary Weissman and Susan Rhode submitted Proposed Findings and Conclusions of Denise Mitten and Respondent Mitten's Post-Trial Memorandum dated March 5, 1999. The Court received all of these submissions on March 8, 1999.

The Court, having considered the testimony and exhibits received at trial, together with all the files, records, submissions, and proceedings herein, makes the following:

FINDINGS OF FACT

Introduction and Procedural Background

1. The true and correct names, ages, birth dates, addresses, and social security numbers of the parties are as follows:

Mark E. LaChapelle
3857 Brookview Drive
St. Louis Park, MN 55426
Birthdate: April 28, 1955, now age 44
SSN: 399-52-5084

Valerie G. Ohanian
5241 Upton Avenue South
Minneapolis, MN 55410
Birthdate: October 9, 1951, now age 47
SSN: 550-92-7034

Appendix B

Denise S. Mitten
P.O. Box 66
Hersey, MI 59639
Birthdate: August 16, 1953, now age 45
SSN: 222-40-9284

Lauren Mitten Katherine Ohanian
P.O. Box 66
Hersey, MI 59639
Birthdate: January 4, 1993, now age 6

2. Denise Mitten (Mitten) and Valerie Ohanian (Ohanian) were life partners for approximately eleven years, until they ended their relationship in June 1996. Mark LaChapelle (LaChapelle) and Scott Brush (Brush) have been life partners for approximately sixteen years. In 1990, Mitten, Ohanian, LaChapelle, and Brush were introduced by a mutual friend for the purpose of conceiving and raising a child.

3. On December 8, 1990, LaChapelle and Mitten signed a Donor Agreement, in which they agreed that LaChapelle would supply semen to Mitten for the purpose of artificial insemination. The Donor Agreement also provided that LaChapelle would have no parental rights with respect to any child born of the artificial insemination and that Mitten would not hold LaChapelle legally, financially, or emotionally responsible for the child. The Donor Agreement also provided that any disputes arising under the agreement would be submitted to binding arbitration.

4. Between December 1990 and April 1992 LaChapelle provided semen to Mitten with which Mitten attempted artificial insemination. In April 1992 Mitten became pregnant.

5. On May 17, 1992, Mitten, Ohanian, LaChapelle, and Brush signed a written document entitled "Agreement as to the Best Interests of" (Best Interests Agreement). The Best Interests Agreement provided that Mitten and Ohanian would be the parents of the child born of artificial insemination and LaChapelle and Brush would have "significant relationships with the child." Specifically, the Best Interests Agreement stated that Mitten and Ohanian would have legal and physical custody of the child, while LaChapelle and Brush would have visitation as detailed in the agreement. The Best Interests Agreement contained no mechanism for resolving disputes.

6. Brush is not a party to this action and has not pursued any rights under the Best Interests Agreement.

7. Lauren Mitten Katherine Ohanian (Lauren) was born to Mitten on January 4, 1993. On her birth certificate, the space for the father's identity was left blank.

8. Shortly after Lauren's birth, Mitten and Ohanian petitioned this Court to adopt Lauren. The Petition for Adoption submitted to the Court indicated that the child's father was "artificial insemination." Neither Mitten, Ohanian, nor LaChapelle informed the Court that Mitten was aware of the sperm donor's identity.

They also did not inform the Court of the Donor Agreement or Best Interests Agreement.

9. On September 9, 1993, the adoption was granted, and the Adoption Decree was filed on September 10, 1993. The adoption file is Hennepin County Court File AD 181411.

10. After Lauren's birth, LaChapelle and Brush visited her frequently. LaChapelle continued to have visitation with Lauren until August 1994. At that point, Mitten and Ohanian terminated LaChapelle's visitation with Lauren due to rising tension between the parties concerning LaChapelle's role in Lauren's life.

11. On September 14, 1994, LaChapelle brought a motion to vacate the adoption based on fraud, misrepresentation, and misconduct and to adjudicate LaChapelle the biological father of Lauren.

12. On August 7, 1995, this Court issued an Order vacating the adoption based on fraud upon the Court and granted interim legal and physical custody of Lauren to Mitten. The Order also permitted LaChapelle to file an affidavit of intent to retain parental rights with the Minnesota Department of Health pursuant to Minnesota Statutes section 259.51 if he intended to assert paternity rights.

13. On August 25, 1995, LaChapelle filed an affidavit stating his intention to retain parental rights.

14. On September 5, 1995, LaChapelle filed a Summons and Complaint to adjudicate paternity. The paternity file is Hennepin County Court File PA 33665.

15. On September 21, 1995, Mitten filed a statement with the Department of Vital Statistics denying paternity and also filed an answer to the paternity petition.

16. Mitten and Ohanian also filed a new petition for adoption. This Court denied the petition in an Order filed on September 26, 1995 based on the fact that LaChapelle had not consented to the adoption.

17. Mitten also filed a Petition for Termination of Parental Rights dated September 25, 1995. That file is Hennepin County Court File J3-95-68532.

18. In January 1996, Mitten filed a motion for summary judgment on the Termination of Parental Rights petition brought by Mitten. On February 7, 1996, this Court ruled from the bench that Mitten's motion for summary judgment terminating LaChapelle's parental rights would not be granted.

19. During the spring of 1996, Ohanian and Mitten ended their relationship.

20. On July 16, 1996, this Court issued an Order denying Mitten's motion to dismiss the paternity petition and granting LaChapelle's motion for summary judgment on the Termination of Parental Rights petition. The Court also dismissed the Petition for Termination of Parental Rights.

21. Mitten subsequently sought employment in Michigan and asked this Court's permission to move to Michigan with Lauren.

22. On August 19, 1996, this Court heard oral arguments on Mitten's motion to move Lauren to Michigan. At the hearing, Ohanian appeared and petitioned the Court for joint legal and physical custody of Lauren.

23. On August 30, 1996, this Court issued an Order granting Mitten's request to move to Michigan, requiring the parties to submit to blood tests, and ordering the parties to select a Visitation Expediter. LaChapelle's motions for joint legal and physical custody, an independent custody and visitation evaluation, and attorney's fees were denied as premature. The Court also denied Mitten's motion to compel arbitration. The Court granted Ohanian's motion to consolidate her custody petition with LaChapelle's custody petition — Hennepin County Court File PA 33665. Ohanian's motions for an evidentiary hearing, custody, and appointment of a guardian ad litem were denied as premature. Additionally, the Court ordered the parties to select a visitation expeditor within thirty days or the Court would appoint one. Subsequently, Tsippi Wray was appointed as the visitation expeditor.

24. This Court issued an Order on April 3, 1997, granting LaChapelle and Ohanian monthly interim visitation alternating between Michigan and Minnesota. Mitten sought a writ of prohibition from the Minnesota Court of Appeals to restrain enforcement of that Order. On

May 20, 1997, the Court of Appeals denied Mitten's petition.

25. On June 12, 1997, this Court granted LaChapelle's motion for adjudication of paternity and found that LaChapelle is the father of Lauren. Under the June 12, 1997 Order, interim legal and physical care, custody, and control of the minor child remained with Mitten. The issues of permanent child support, medical insurance coverage, and day care contribution were reserved. The issue of Ohanian's visitation with Lauren was reserved, subject to the Court's April 3, 1997 Order.

26. In addition, on June 12, 1997, the Court ordered that the parties complete a custody and visitation evaluation. The Court ordered that the cost of the custody and visitation evaluation be divided equally between Mitten, LaChapelle, and Ohanian. Further, Lauren was joined as a party to this action, and the Court ordered that a guardian ad litem be appointed to represent her.

27. Mitten appealed the adjudication of paternity, this Court's determination that LaChapelle and Ohanian had standing to seek custody of the minor child, and this Court's denial of Mitten's motion to compel arbitration. That appeal was dismissed and discretionary review was denied.

28. On July 17, 1997, this Court ordered LaChapelle to pay interim child support in the amount of $600.00 on July 1, 1997, $600.00 on July 15, 1997, and $600.00 on August 1, 1997. The Court denied Mitten's request that

LaChapelle and Ohanian be required to pay a portion of the cost of visitation in Minnesota.

29. By an Order dated and filed November 10, 1997, this Court ordered LaChapelle to pay Mitten permanent child support in the amount of $706.00 per month, $210.00 per month for childcare costs, $50.00 per month for health insurance premiums, fifty percent (50%) of any uninsured medical or dental costs, and child support arrearages in the amount of $3,996.00. The Court ordered Mitten to maintain health insurance for Lauren. Finally, the Court appointed Roseanne Nathanson as the guardian ad litem for Lauren and Dr. Karen Irvin (Irvin) as the neutral custody and visitation evaluator. The costs incurred for the services of the guardian ad litem and neutral custody and visitation evaluator were to be divided equally among Mitten, Ohanian, and LaChapelle.

30. By an Order dated and filed November 6, 1998, the Court granted Mitten's motion to order Ohanian to comply with discovery requests, granted LaChapelle's motion to order Mitten to provide documentation regarding child care costs and her 1998 income, denied Ohanian's motion to order additional psychological testing on all parties, and ordered that all other motions before the Court would be decided after a trial on the merits. Finally, the matter was set for trial the week of December 14, 1998.

31. On December 11, 1998 this Court issued an order continuing the trial to February 1, 1999 due to the illness of Lauren.

Appendix B

32. On January 15, 1999, a hearing was held before this Court pursuant to LaChapelle's motion in limine and Mitten's motion in limine. LaChapelle sought to preclude Mitten from using the deposition of Marcia Bull, Lauren's therapist, at trial. At the hearing on this matter, counsel for Mitten acknowledged the use of Marcia Bull's deposition would be fundamentally unfair to the other parties and agreed not to use Marcia Bull's deposition at trial. In addition, LaChapelle sought to have Irvin's custody evaluation admitted into evidence in its entirety. Counsel for all of the parties agreed that the custody evaluation shall be admitted into evidence in its entirety. Additionally, on February 1, 1999, the Court issued an order denying Mitten's motion in limine and ruled that Ohanian has standing to seek legal and physical custody of Lauren. The Court also ruled that Irvin may testify at the trial as to facts and her opinions and that specific objections to her testimony could be made at trial. The Court also ordered the party calling Irvin as a witness to pay the initial fee and that the cost of her testimony would be determined at the conclusion of the trial. Finally, the Court denied LaChapelle's motion for attorney fees.

33. The matter came on for a court trial on February 1 – 3, 1999.

34. The Court heard testimony from the following witness: Irvin, Ohanian, Mitten, LaChapelle, and Nathanson.

Appendix B

The Parties' Agreement

35. Prior to the commencement of trial, the parties reached an agreement as to some of the issues that were to be tried. That agreement is as follows:

    1. Mitten and Ohanian shall share joint legal custody of Lauren.

    2. Mitten and Ohanian shall inform Lauren's school officials and teachers; medical and child care providers, and coordinators, directors and/or supervisors of Lauren's extracurricular activities that LaChapelle is Lauren's parent.

    3. Mitten and Ohanian shall allow LaChapelle the opportunity to provide input on significant decisions involving Lauren, including, but not limited to, education, medical care, child care, religious and/or spiritual training or guidance, and extracurricular activities. However, Mitten and Ohanian shall have the authority to make all final determinations on these issues.

    4. Mitten and Ohanian shall provide LaChapelle with the following:

        a. The name and address of Lauren's school(s), and the names of her teachers, medical care providers, and child care providers;

        b. Lauren's school schedule as soon as it is available prior to the commencement of the

upcoming quarter or semester, and any changes to that schedule;

c. A schedule of Lauren's extracurricular activities, and any changes to those activities;

d. Information regarding upcoming school, religious and/or spiritual, and extracurricular events in which Lauren is involved; and

e. Regular updates regarding Lauren's physical and mental health.

5. LaChapelle shall be entitled to the following:

a. The opportunity to provide input on significant decisions affecting Lauren, including but not limited to, education, medical care, religious and/or spiritual training or guidance, extracurricular activities, and child care;

b. Access to information and records pertaining to Lauren's education, extracurricular activities, medical and dental care, religious and/or spiritual training, and other important information and events. Presentation of a copy of this order to the custodian of a record or other information about Lauren constitutes sufficient authorization for the release of the record or information to LaChapelle;

c. Timely notification of an accident or serious illness of Lauren, and the name of the health care provider and the place of treatment;

d. Access to information regarding health or dental insurance available to Lauren;

e. The right to be informed by and to contact and/or meet with school officials about Lauren's welfare, educational progress and status, and to attend school and parent teacher conferences;

f. To attend Lauren's school, religious and/or spiritual, and extracurricular events;

g. Reasonable mail, telephone and Internet access with Lauren.

36. The Court finds that this agreement is in Lauren's best interest.

Residence

37. LaChapelle and Ohanian ask this Court to relocate Lauren's residence back to the Twin Cities. Mitten opposes that request and asserts that Lauren's residence should remain in Hersey, Michigan.

38. By an Order dated and filed August 30, 1996, this Court granted Mitten's motion for permission to move her permanent residence to Hersey, Michigan. In October

1996, Mitten moved to Hersey, Michigan to take a full-time position as a director at Eagle Village. Her annual salary at that employment was $42,000.00. Mitten's employment with Eagle Village was terminated after one year. Since that time, Mitten has not been employed full-time, and, as a result, her annual income has decreased significantly.

39. LaChapelle and Ohanian travel to Michigan every other month for a three – four day visitation period with Lauren. On the alternating months, Lauren travels to the Twin Cities for visitation with LaChapelle and Ohanian.

40. Hersey, Michigan is a rural area. Generally, when LaChapelle and Ohanian have visitation in Michigan, they must fly to the Reed City airport, rent a car, and drive two to three hours to Hersey. At times of inclement weather, traveling back and forth to Michigan is even more cumbersome and time intensive.

41. While visiting Lauren in Michigan, LaChapelle and Ohanian generally stay with Lauren at the Holiday Inn in Big Rapids, which is twenty-five miles from Hersey. They also have stayed at a Ferris State University apartment, which is in Big Rapids, and they have stayed once at a cabin owned by one of LaChapelle's relatives, which is more than a two-hour drive from Hersey.

42. Because of the limitations on where LaChapelle and Ohanian can stay with Lauren in Michigan, the ability to participate in meaningful, normal, daily activities,

such as cooking, is severely hampered. When they stayed in the college apartment, cooking was limited because the apartment was equipped only with a small refrigerator and a microwave. As a result, they ate most meals at the college cafeteria. At the Holiday Inn, they must eat nearly every meal in the hotel's restaurant. In addition, the space in which they can interact with Lauren is very limited. At the Holiday Inn, they can spend time in the hotel room, by the pool, or in the hotel lobby where the registration desk is located and guests are frequently checking in and out of the hotel.

43. Because Hersey is a very rural area, there are no practical places for LaChapelle and Ohanian to stay within Lauren's community.

44. LaChapelle and Ohanian do not know exactly where Lauren lives — they have never been to or seen Mitten's home. Generally, when Mitten and Ohanian meet to exchange Lauren for visitation, they meet at a car wash some distance from Mitten's home. Mitten has been reluctant to (and generally has not permitted) Ohanian or LaChapelle to meet Lauren at other places such as Lauren's school, a social event, a community event, or an extracurricular activity.

45. Both the logistics of the visitation and Mitten's reluctance to allow LaChapelle and Ohanian to attend Lauren's school and extracurricular activities have prevented LaChapelle and Ohanian from becoming integrated in Lauren's Michigan community.

46. Due to the logistics and artificial settings where the visitation occurs (college dormitories, cabins, and hotels), LaChapelle and Ohanian's visitation with Lauren in Michigan is not conducive to maintaining or further developing their parental roles and relationship with Lauren.

47. Were Lauren's residency to remain in Michigan, this Court is hard pressed to see how a meaningful parental relationship could be maintained between Lauren and LaChapelle or Ohanian.

48. Lauren's residency in Hersey, Michigan has denied LaChapelle and Ohanian regular and frequent contact with Lauren. Likewise, Lauren has been denied regular and frequent contact with LaChapelle and Ohanian.

49. Moreover, the financial cost to maintain visitation with Lauren in Michigan and the cost of bringing Lauren to Minnesota for visitation is enormous. On average, between airfare, rental cars, accommodations, and food, Mitten spends $1,000.00 per month, LaChapelle spends over $300.00 per month, and Ohanian spends over $1,000.00 per month.

50. Irvin testified that her first request would be to have Mitten and Lauren move back to the Twin Cities metro area; or, in the alternative, Mitten and Lauren should move to a location with two hours of the Twin Cities metro area. Irvin ultimately recommended that Lauren live in the Twin Cities.

51. Nathanson testified that although Lauren's experience in Michigan has been a good one, it is in Lauren's best interest to move back to Minnesota and that the move should occur before Lauren enters first grade.

52. Lauren will enter first grade in September 1999.

53. If Lauren were to remain in Michigan, frequent trips or visitation with Ohanian and LaChapelle likely would be more difficult in the future because of school and extracurricular activities.

54. Were Lauren's residency moved to Minnesota, the opportunity to have casual contact with LaChapelle and Ohanian would be possible — meaning they could attend a school or extracurricular activity or Lauren could come to their house for dinner.

55. Life will be easier for Lauren if she does not have to travel. Moreover, the less travel obstacles that exist for Lauren to have visitation with each of her parents, the more contact Lauren will have with each of her parents and the better off Lauren will be.

56. Lauren has substantial ties in the Twin Cities area, including family and friends.

57. Irvin testified that Lauren hard time figuring out what she is feeling and what makes her happy. Irvin also testified that Lauren stands less of a chance of this occurring if she were to live in LaChapelle and Ohanian's community (the Twin Cities).

Appendix B

58. In most custody/visitation decisions, a court need only allocate custody and visitation between two parents; however, the circumstances of this case are unique. The fact that visitation must be arranged between three parents each month, several times a month, greatly compounds the problems created by the distance between Michigan and Minnesota. When this Court previously granted Mitten's request to move to Michigan, it was not known at that time how custody and visitation would be allocated between the three adults. Since then, and through the course of this trial, the Court has become acutely aware of how significant Lauren's relationship is with Mitten, LaChapelle, and Ohanian. This Court is also acutely aware of how the distance between Michigan and Minnesota has impacted Lauren's life and her relationship with each of these adults. Were Lauren to remain in Michigan, it is not likely that she would be able to maintain meaningful, intimate relationships with Ohanian and LaChapelle. The location of her residency and the manner in which visitation occurs, especially during the next few years, will greatly impact Lauren's relationship with each of these three adults. Neither Mitten's desire to live in rural Michigan nor the convenience and expense incurred by LaChapelle and Ohanian in visiting Lauren there are the primary factors with which this Court bases its decision. Instead, this Court looks at Lauren's best interest in deciding how custody, visitation, and her residency can provide meaning, positive, parental relationships with each of her three parents.

Appendix B

59. Therefore, based on the foregoing, the Court finds that it is in Lauren's best interest that she live within the seven county metropolitan area of the Twin Cities and that her residency should be moved to within that local by September 1, 1999.

Physical Custody

60. To reiterate, the parties have agreed that Mitten and Ohanian will share joint legal custody, and the Court finds that this is in Lauren's best interest. Ohanian also seeks joint physical custody to be shared with Mitten. LaChapelle does not seek physical custody of Lauren; however, he supports Ohanian's request for joint physical custody.

61. In determining the issue of custody, this Court is guided by the factors outlined in Minnesota Statutes section 518.17 (the best interests of the child) and finds as follows:

    a. *Wishes of the child's parent*: Mitten would like sole physical custody of Lauren. Ohanian would like joint physical custody of Lauren, and LaChapelle supports Ohanian's request for joint physical custody.

    b. *Child's preference*: Lauren is not of a sufficient age to express a preference as to custody.

    c. *Primary caretaker*: Mitten has been Lauren's primary caretaker since she was born; however

before Mitten and Ohanian separated, Ohanian also significantly participated in the daily care of Lauren.

d. *Intimacy of the relationship*: Lauren has a very intimate relationship with both Mitten and Ohanian. Clearly, both Mitten and Ohanian are emotional parents to Lauren — meaning that Lauren looks to both for comfort, solace, and security, that Lauren trusts each for the information she is given by them, that Lauren shares information comfortably with them day in and day out. She refers to Ohanian as "MaMa" and Mitten as "Mommy." She has expressed a preference to Irvin that she wants both "MaMa" and "Mommy" in her family.

e. *Interaction and interrelationship with parents and others*: Lauren has a very comfortable relationship with both Mitten and Ohanian. Both Mitten and Ohanian are emotional parents to Lauren. Both Mitten and Ohanian can provide daily care to Lauren. Both Mitten and Ohanian have extended family with whom Lauren has developed significant relationships.

f. *Child's adjustment to home, school, and community*: Lauren appears to be a well-adjusted child who can adapt easily to her living environments.

g. *Length of time Lauren has lived in a stable, satisfactory environment and the desirability of maintaining continuity*: Stability and continuity are especially important factors given the uniqueness

of Lauren's family structure. Mitten has been Lauren's primary caretaker since her birth. In light of the fact that Lauren will be moving from Michigan to Minnesota, some stability and continuity will be preserved if Mitten were to remain her primary caretaker.

h. *Permanence, as a family unit, of the existing or proposed custodial home*: Ohanian has lived in the Twin Cities for over twenty-four years and she owns a home here. However, Lauren has not lived with Ohanian for over two and one half years. Although Mitten will be moving to the Twin Cities area, nothing indicates that she could not also provide a permanent home for Lauren.

i. *Parents' Health*: Both Mitten and Ohanian have good mental and physical health.

j. *Capacity and disposition for the parties to give the child love, affection, and guidance, and to continue educating and raising the child in the child's culture and religion or creed, if any*: Both Mitten and Ohanian are emotional parents to Lauren and have similar parenting philosophies. Both are capable and committed to giving Lauren the love, affection, and guidance that she needs.

k. *Cultural Background*: Lauren's cultural background is not a significant factor in determining custody.

l. *Domestic Abuse*: Domestic abuse is not an issue in this case.

m. *Disposition of each parent to encourage and permit frequent and continuing contact by the other parent with the child*: Both Mitten and Ohanian are committed to ensuring that Lauren has contact with all of her parents, including LaChapelle. However, Mitten's desire to change Lauren's name and her characterization of Ohanian as a "significant person" in Lauren's life, as opposed to characterizing Ohanian as a parent undermines Ohanian's parental role in Lauren's life. Mitten testified that she feels Lauren should only have two parents with her as the primary parent and either LaChapelle or Ohanian as the secondary parent. At times, Mitten has tried to alienate Lauren from LaChapelle and Ohanian; however, both Mitten and Ohanian have complied with the Court's orders regarding visitation and neither are opposed to Lauren having visitation with the other or LaChapelle.

62. In order to award Mitten and Ohanian joint physical custody, the Court must also consider the following:

a. *The ability of the parents to cooperate in the rearing of Lauren*: The record does not establish that Mitten and Ohanian have the ability to cooperate in the daily rearing of Lauren. There is still much contention between Mitten and Ohanian, and it would be better for Lauren if one parent were responsible for the primary daily care of Lauren. However, it is important to note that the Court is supportive of the parties' decision to share legal custody, because there is much evidence in the record that Mitten and

Ohanian share similar values and parenting philosophies.

b. *Methods for resolving disputes*: Ohanian and Mitten have used a visitation expeditor, a guardian ad litem, and a parenting consultant in order to resolve disputes involving Lauren. However, Ohanian and Mitten do not have the ability, at this time, to resolve disputes among themselves.

c. *Whether it would be detrimental to Lauren if one person were to have sole authority over Lauren's upbringing*: Mitten, Ohanian, and LaChapelle have all agreed that Mitten and Ohanian shall share joint legal custody. The fact that either Mitten or Ohanian would have sole authority over Lauren's daily care would not be detrimental to Lauren.

d. *Domestic Abuse*: Domestic Abuse is not a factor in this case.

63. Although Mitten is opposed to Lauren's residency being moved to Minnesota, based on Mitten's testimony, it appears that she would move to Minnesota with Lauren if the Court ordered that Lauren's residency be changed to Minnesota. Mitten testified that she would move to wherever Lauren lives.

64. The Court finds that if Mitten also relocates to a location in the seven county metropolitan area of the Twin Cities, it is in Lauren's best interest that sole physical custody be awarded to Mitten and Lauren's primary residence be with Mitten.

Appendix B

Visitation

65. Dr. Irvin testified that Lauren needs at least monthly contact with LaChapelle and Ohanian, and she recommended weekly contact with LaChapelle and Ohanian if Lauren were to reside in Minnesota.

66. Nathanson testified that ordinary, day to day contact with all three parents should be explored.

67. It is in Lauren's best interest that she spend two uninterrupted weeks in July 1999 and two uninterrupted weeks in August 1999 with LaChapelle and Ohanian in Minnesota. LaChapelle and Ohanian shall share this time equally. The guardian ad litem shall coordinate these visits.

68. It is fair and reasonable that LaChapelle and Ohanian be responsible for all visitation and transportation costs from the date of this Order through August 1999.

69. It is in Lauren's best interest to have weekly in person contact with LaChapelle and Ohanian after September 1, 1999.

70. Based on the foregoing, the Court finds that the following access schedule is in Lauren's best interest and should commence on September 1, 1999:

    a. On alternate weeks, Lauren shall have one non-overnight weekday visit with LaChapelle and one non-overnight weekday visit with Ohanian. The non-

overnight weekday visit shall commence immediately following Lauren's school day end or 4:00 p.m. if there is no school and shall end at 8:00 p.m. unless otherwise agreed to by the parties involved.

b. Lauren shall have two weekend visits per month with Ohanian. The weekend visitation shall occur on the first and third weekend of each month. A weekend shall commence on Friday immediately following Lauren's school day end or 4:00 p.m. on a day in which there was no school and end at 7:00 p.m. on Sunday, unless otherwise agreed upon by the parties involved.

c. Lauren shall have one weekend visit per month with LaChapelle. The weekend visitation shall occur on the fourth weekend of each month. A weekend shall commence on Friday immediately following Lauren's school day end or 4:00 p.m. on a day in which there was no school and end at 7:00 p.m. on Sunday, unless otherwise agreed upon by the parties involved.

d. Holidays and school breaks shall be shared as follows:

1. *Martin Luther King weekend*:
   Odd years: LaChapelle and Ohanian to share.
   Even years: Mitten.

Appendix B

2. *President's Day weekend*:
   Odd years: Mitten.
   Even years: LaChapelle and Ohanian to share.

3. *Spring Break*:
   Odd years: LaChapelle and Ohanian to equally divide.
   Even years: Mitten.

4. *Easter Sunday*:
   Odd years: LaChapelle and Ohanian to share.
   Even years: Mitten.

5. *Mother's Day*:
   Odd years: Mitten.
   Even years: Ohanian.

6. *Memorial Day weekend*:
   Odd years: Mitten.
   Even years: LaChapelle and Ohanian to share.

7. *Summer Vacation*: LaChapelle and Ohanian shall be entitled to a total of four weeks of visitation during Lauren's summer break from school, excluding visitation on holidays otherwise provided for in this Order. That time shall be shared equally between LaChapelle and Ohanian. However, until the summer of 2003, the longest period of time that Lauren should

go without having in person contact with Mitten shall be two weeks.

The regular visitation schedule shall remain in effect during the summer, except Mitten shall have a two-week period during which LaChapelle and Ohanian shall not have visitation. Any disputes concerning how the summer vacation time is to be divided or when it shall occur shall be submitted to the arbitration panel. After January 2003, Ohanian and/or LaChapelle may petition the Court for additional visitation time in the summer with Lauren.

8. *Father's Day*: Every year with LaChapelle.

9. *Independence Day weekend*:
   Odd years: Mitten.
   Even years: LaChapelle.

10. *Labor Day weekend*:
    Odd years: LaChapelle and Ohanian to share.
    Even years: Mitten.

11. *MEA convention*:
    Odd years: Mitten.
    Even years: Ohanian.

Appendix B

12. *Thanksgiving weekend (4 days)*:
    Odd years: Mitten.
    Even years: LaChapelle and Ohanian to share.

13. *Christmas Break*: (including New Years Eve and Day) shall be divided into two equal segments. In the odd years, Mitten shall choose first as to which segment she would like. In the even years, LaChapelle and Ohanian shall choose first as to which segment they would like. LaChapelle and Ohanian shall share their segment.

14. *Christmas Eve*:
    Odd years: LaChapelle and Ohanian to share.
    Even years: Mitten.

15. *Christmas Day*:
    Odd years: Mitten.
    Even years: LaChapelle and Ohanian to share.

e. Visitation may also occur at such other times as agreed upon by the parties.

f. All parties also have the right to attend any school, religious and/or spiritual, or extracurricular events in which Lauren is involved.

g. In the event that one party is unable to care for Lauren during his or her scheduled time for more

than two hours, or scheduled child care becomes unavailable, the other two parties shall have the right of first refusal to care for Lauren before alternative child care arrangements are made. If any one of the parties is able to care for Lauren before and/or after school, that party shall have the right to do so, rather than placing Lauren in day care.

71. After September 1, 1999, because Lauren will be residing in Minnesota, this Court does not foresee that visitation costs will be significant, if any exist at all. However, in the event that visitation costs are incurred, it is fair and reasonable that each party bears its own cost of visitation.

Child Support

72. LaChapelle and Ohanian, as Lauren's parents, are obligated to pay child support.

73. LaChapelle is a self-employed psychotherapist. He is a partner with four other individuals in an S-corporation that is the "umbrella" over Northland Therapy Center where he works. Each therapist is an independent contractor with the clinic. Each month he draws income from the clinic for his work, and each month he is charged for overhead expenses.

74. LaChapelle's income consists of business income, taxable interest income, dividend income, capital gains and losses, and partnership income and losses. Pursuant to Minnesota Statutes section 518.54, subdivision 6, it

is appropriate to include LaChapelle's business income and partnership income and losses in determining his net monthly income. It is also appropriate to include LaChapelle's interest and dividend income in the calculation of his net monthly income because he regularly receives interest and dividend income every year.

75. LaChapelle's capital gains are not a regular source of income or a periodic payment as contemplated under Minnesota Statute section 518.54, subdivision 6. Therefore, the Court finds it appropriate to exclude LaChapelle's capital gains and losses for purposes of determining his net monthly income.

76. LaChapelle's SEP retirement contribution, as reflected on his tax returns, is a reasonable amount as he is a self-employed person with no employer funded retirement plan.

77. LaChapelle also has single medical insurance coverage at the cost of $55.00 per month. LaChapelle is able to obtain dependent medical coverage for Lauren at the cost of approximately $50.00 per month.

78. LaChapelle's income varies from year to year. Therefore, the Court finds that it is fair and reasonable to average LaChapelle's income over the past four years in order to determine child support.

79. Based on LaChapelle's 1995 through 1998 tax returns: LaChapelle's income in 1995 was $80,654.00;

LaChapelle's income in 1996 was $90,015.00; LaChapelle's income in 1997 was $82,156.00; and LaChapelle's income in 1998 was $70,803.00. Thus, his average annual gross income is $80,907.00.

80. LaChapelle is entitled to a $300.00 deduction from his average annual gross income for medical insurance.

81. In determining LaChapelle's net monthly income, the Court finds it reasonable to use state and federal tax tables, as the Court is averaging LaChapelle's income and that average does not include his capital gains and losses, which are reflected in his actual tax liability on his income tax returns.

82. LaChapelle's net monthly income is calculated as follows:

Average gross monthly income:	$6,717.00
Federal taxes:	(1,544.00)
State taxes:	(491.00)
Self-employed social security tax:	(707.00)
Self-employed Medicare tax:	(196.00)
Individual medical insurance:	(55.00)
Net monthly income:	**$3,724.00**

83. Based on Ohanian's 1997 tax return, her annual gross income is $104,259.00

84. Ohanian's net monthly income is calculated as follows:

Gross monthly income:	$8,688.00
Federal taxes:	(1,892.00)
State taxes:	(586.00)
Self-employed social security tax:	(707.00)
Self-employed Medicare tax:	(227.00)
Net monthly income:	**$5,276.00**

85. The Supreme Court has set the income limit under Minnesota Statutes section 518.551, subdivision 5(b) at $5,935.00 per month. LaChapelle and Ohanian's combined incomes exceed the income limit. LaChapelle and Ohanian's combined child support obligation at the guideline income limit would be $1,484.00.

86. Mitten has not presented any evidence that Lauren's needs are higher than $1,484.00 per month. In fact, in her arguments to the Court, Mitten only sought $1,276.00 per month in child support from LaChapelle and did not seek any child support from Ohanian. However, LaChapelle and Ohanian have agreed to pay combined support at the income limit currently in effect.

87. It is fair and reasonable for LaChapelle and Ohanian to combine their incomes for purposes of determining child support. Moreover, in doing so, Lauren's needs will be met adequately.

88. LaChapelle and Ohanian have agreed to equally divide their child support obligation, and the Court finds that this is fair and reasonable. Therefore, LaChapelle and

Ohanian's child support obligation would be $742.00 per month each.

89. LaChapelle and Ohanian have agreed each will pay Mitten child support in the amount of $1,000.00 per month for six months to allow Mitten time to re-establish herself in the Twin Cities.

90. Mitten argues that child support should be made effective August 13, 1998 and, therefore, that she is entitled to arrearages. Given the unique circumstances of this case, it would not be fair and reasonable to award child support arrearages dating back to August 13, 1998.

91. It is fair and reasonable that Mitten claim the income taxation dependency exemption for Lauren, as she has physical custody of Lauren.

Medical and Dental Costs

92. Mitten's monthly net income in 1998 was approximately $800.00. Mitten anticipates that her 1999 income will increase. Given that Mitten will be relocating to the Twin Cities, her future employment status is unknown.

93. Based proportionately on their incomes, LaChapelle shall pay forty-five percent (45%) of Lauren's medical and dental insurance premium and any uninsured medical or dental costs; Ohanian shall pay forty-five percent (45%) of Lauren's medical and dental insurance premium and any uninsured medical or dental costs; and Mitten shall pay ten percent (10%) of Lauren's

medical and dental insurance premium and any uninsured medical or dental costs.

94. Mitten currently pays for the cost of dependent COBRA medical insurance coverage.

95. LaChapelle testified that if Lauren resides in Minnesota, he could add her as a dependant to his medical coverage for approximately $50.00 per month. It would be in Lauren's best interest for LaChapelle to add Lauren as a dependant to his medical coverage. However, in the event that Mitten obtains more comprehensive dependent medical insurance, then it would be in Lauren's best interest for Mitten to obtain that insurance.

Day Care Costs

96. Lauren's day care needs are constantly changing and will continue to decrease as she ages and attends school for longer periods of time. Therefore, rather than ordering LaChapelle and Ohanian to pay Mitten a specific dollar amount, it is fair that Mitten to provide LaChapelle and Ohanian documentation of Lauren's day care costs and that they reimburse Mitten proportionately.

97. Based proportionately on their incomes, LaChapelle shall pay forty-five percent (45%) of Lauren's day care costs, Ohanian shall pay forty-five percent (45%) of Lauren's day care costs, and Mitten shall pay ten percent (10%) of Lauren's day care costs.

Appendix B

Expert Witness Fees

98. During the trial, each party questioned Irvin for roughly equal periods of time. Each party relied on Irvin's testimony in support of their case. Therefore, it is fair and reasonable that the parties equally divide the cost of Irvin's testimony.

Name Change

99. Neither Irvin nor Nathanson recommended that Lauren change her name.

100. Enormous thought and care went into choosing Lauren's name. Mitten, Ohanian, LaChapelle, and Brush all gave input into choosing the name. While other members of Lauren's family have variations of the name "Katherine," it is also significant because LaChapelle's mother and grandmother's names are Katherine.

101. Mitten testified that the "Ohanian" name given to Lauren is no longer relevant because LaChapelle and Mitten are Lauren's parents; however, this Court finds that the "Ohanian" name given to Lauren is very significant specifically because Ohanian is Lauren's parent and will share joint legal custody with Mitten.

102. Changing Lauren's name would send her the message that other things in life have changed or will change. This would not be in Lauren's best interest.

Appendix B

103. Lauren needs a sense of continuity in her identity. Keeping Lauren's name the same will help to give her a sense of continuity in her identity, and, in the very least, will not add to any confusion she feels about her identity and who consists of her family and parents.

104. Therefore, the Court finds that it is not in Lauren's best interest to change her name; her name shall remain Lauren Mitten Katherine Ohanian.

Parenting Consultant/Mediation Panel

105. The parties have worked with a visitation expeditor, a parenting consultant, and a guardian ad litem to help resolve disputes that have arisen.

106. Irvin testified that the parties have made a lot of progress with Dr. Maddock, the parenting consultant, towards resolving their disputes and healing their relationships. However, Irvin also testified that the parties do not have an established record showing that they can resolve disputes without the assistance of another person.

107. Nathanson recommended that the parties continue to work with a parenting consultant.

108. It is in Lauren's best interest that the parties minimize conflict and maximize stability and cooperation. Having a dispute resolution process in place will help the parties minimize conflict and maximize stability and cooperation.

109. It is in Lauren's best interest that the parties continue to work with a parenting consultant and the guardian ad litem, and that the parties first attempt to mediate any disputes between the parties that affect Lauren with the parenting consultant and guardian ad litem prior to bringing the dispute before a court.

CONCLUSIONS OF LAW

Jurisdiction

1. Minnesota is the proper jurisdiction under the Uniform Child Custody Jurisdiction Act to enter an order regarding the custody, care, and control of Lauren.

Legal Custody

2. Mitten and Ohanian shall share joint legal custody of Lauren.

3. Mitten and Ohanian shall inform Lauren's school officials and teachers; medical and child care providers, and coordinators, directors and/or supervisors of Lauren's extracurricular activities that LaChapelle is Lauren's parent.

4. Mitten and Ohanian shall allow LaChapelle the opportunity to provide input on significant decisions involving Lauren, including, but not limited to, education, medical care, child care, religious and/or spiritual training or guidance, and extracurricular activities. However, Mitten and Ohanian shall have the

authority to make all final determinations on these issues.

5. Mitten and Ohanian shall provide LaChapelle with the following:

   a. The name and address of Lauren's school(s), and the names of her teachers, medical care providers, and child care providers;

   b. Lauren's school schedule as soon as it is available prior to the commencement of the upcoming quarter or semester, and any changes to that schedule;

   c. A schedule of Lauren's extracurricular activities, and any changes to those activities;

   d. Information regarding upcoming school, religious and/or spiritual, and extracurricular events in which Lauren is involved; and

   e. Regular updates regarding Lauren's physical and mental health.

6. LaChapelle shall be entitled to the following:

   a. The opportunity to provide input on significant decisions affecting Lauren, including but not limited to, education, medical care, religious and/or spiritual training or guidance, extracurricular activities, and child care;

b. Access to information and records pertaining to Lauren's education, extracurricular activities, medical and dental care, religious and/or spiritual training, and other important information and events. Presentation of a copy of this order to the custodian of a record or other information about Lauren constitutes sufficient authorization for the release of the record or information to LaChapelle;

c. Timely notification of an accident or serious illness of Lauren, and the name of the health care provider and the place of treatment;

d. Access to information regarding health or dental insurance available to Lauren;

e. The right to be informed by and to contact and/or meet with school officials about Lauren's welfare, educational progress and status, and to attend school and parent teacher conferences;

f. To attend Lauren's school, religious and/or spiritual, and extracurricular events;

g. Reasonable mail, telephone and Internet access with Lauren.

Residency

7. Lauren's residence shall be a location within the seven county metropolitan area of the Twin Cities, and her residency shall be moved to within that local by

September 1, 1999. If Mitten also relocates to the seven county metropolitan area of the Twin Cities, Lauren's primary residence shall be with Mitten.

8. None of the parties shall remove Lauren from the State of Minnesota for the purpose of changing her place of residence without the written consent of the other two parties or until further order of the Court.

Physical Custody and Access

9. Mitten shall have sole physical custody of Lauren, providing that Mitten shall relocate to the seven county metropolitan area of the Twin Cities.

10. The current access schedule shall remain in effect for June 1999.

11. Lauren shall spend two uninterrupted weeks in July 1999 and August 1999 with LaChapelle and Ohanian in Minnesota. LaChapelle and Ohanian shall share this time equally. The guardian ad litem shall coordinate these visits.

12. LaChapelle and Ohanian shall be responsible for all visitation costs, including transportation, from the date of this Order through August 1999.

13. Commencing September 1, 1999, Mitten, LaChapelle, and Ohanian shall be subject to the following access schedule:

Appendix B

a. On alternate weeks, Lauren shall have one non-overnight weekday visit with LaChapelle and one non-overnight weekday visit with Ohanian. The non-overnight weekday visit shall commence immediately following Lauren's school day end or 4:00 p.m. on a day in which there is no school and shall end at 8:00 p.m. unless otherwise agreed to by the parties involved.

b. Lauren shall have two weekend visits per month with Ohanian. The weekend visitation shall occur on the first and third weekend of each month. A weekend shall commence on Friday immediately following Lauren's school day end or 4:00 p.m. on a day in which there was no school and end at 7:00 p.m. on Sunday, unless otherwise agreed upon by the parties involved.

c. Lauren shall have one weekend visit per month with LaChapelle. The weekend visitation shall occur on the fourth weekend of each month. A weekend shall commence on Friday immediately following Lauren's school day end or 4:00 p.m. on a day in which there was no school and end at 7:00 p.m. on Sunday, unless otherwise agreed upon by the parties involved.

d. Holidays and school breaks shall be shared as follows:

Martin Luther King weekend:

Odd years: LaChapelle and Ohanian to share.
Even years: Mitten.

Appendix B

President's Day weekend:
Odd years: Mitten.
Even years: LaChapelle and Ohanian to share.

Spring Break:
Odd years: LaChapelle and Ohanian to equally divide.
Even years: Mitten.

Easter Sunday:
Odd years: LaChapelle and Ohanian to share.
Even years: Mitten

Mother's Day:
Odd years: Mitten.
Even years: Ohanian.

Memorial Day weekend:
Odd years: Mitten.
Even years: LaChapelle and Ohanian to share.

Summer Vacation: LaChapelle and Ohanian shall be entitled to a total of four weeks of visitation during Lauren's summer break from school, excluding visitation on holidays otherwise provided for in this Order. That time shall be shared equally between LaChapelle and Ohanian. However, until the summer of 2003, the longest period of time that Lauren should go without having in person contact with Mitten shall be two weeks.

The regular visitation schedule shall remain in effect during the summer, except Mitten shall have a two-

week period during which LaChapelle and Ohanian shall not have visitation. Any disputes concerning how the summer vacation time is to be divided or when it shall occur shall be submitted to the arbitration panel. After January 2003, Ohanian and/or LaChapelle may petition the Court for additional visitation time in the summer with Lauren.

Father's Day: Every year with LaChapelle.

Independence Day weekend:
Odd years: Mitten.
Even years: LaChapelle.

Labor Day weekend:
Odd years: LaChapelle and Ohanian to share.
Even years: Mitten.

MEA convention:
Odd years: Mitten.
Even years: Ohanian.

Thanksgiving weekend (4 days):
Odd years: Mitten.
Even years: LaChapelle and Ohanian to share.

Christmas Break: (including New Years Eve and Day) shall be divided into two equal segments. In the odd years, Mitten shall choose first as to which segment she would like. In the even years, LaChapelle and Ohanian shall choose first as to which segment they would like. LaChapelle and Ohanian shall share their segment.

Appendix B

Christmas Eve:
Odd years: LaChapelle and Ohanian to share.
Even years: Mitten.

Christmas Day:
Odd years: Mitten.
Even years: LaChapelle and Ohanian to share.

e. Visitation may also occur at such other times as agreed upon by the parties.

f. All parties also have the right to attend any school, religious and/or spiritual, or extracurricular events in which Lauren is involved.

g. All parties shall have reasonable mail, telephone and Internet access with Lauren when she is in the custody of one of the other parties.

h. In the event that one party is unable to care for Lauren during his or her scheduled time for more than two hours, or scheduled child care becomes unavailable, the other two parties shall have the right of first refusal to care for Lauren before alternative child care arrangements are made. If any of the parties is able to care for Lauren before and/or after school, that party shall have the right to do so, rather than placing Lauren in day care.

14. LaChapelle and Ohanian shall be responsible for all visitation and transportation costs from the date of this Order through August 1999. As of September 1, 1999, each party shall bear its own cost of visitation.

Appendix B

Child Support

15. LaChapelle and Ohanian shall each pay Mitten $1,000.00 per month, payable half on the 1st and half on the 15th days of each month, commencing July 1999 and continuing for six months. Commencing January 1999, LaChapelle and Ohanian shall then each pay Mitten $742.00 per month payable half on the 1st and half on the 15th days of each month.

16. LaChapelle and Ohanian's obligation for the payment of child support shall terminate upon the first to occur of the following events: the child's eighteenth birthday, emancipation, marriage, membership in the Armed Forces of the United States, death, or further order of the Court; provided that support shall continue beyond age eighteen if the minor child is still attending secondary school, or is, by reason of a physical or mental condition, incapable of self-support, but in no event shall support continue beyond the child's twentieth birthday for a child still attending school.

Medical and Dental Expenses

17. LaChapelle shall pay forty-five percent (45%) of Lauren's medical and dental insurance premium and any uninsured medical or dental costs; Ohanian shall pay forty-five percent (45%) of Lauren's medical and dental insurance premium and any uninsured medical or dental costs; and Mitten shall pay ten percent (10%) of Lauren's medical and dental insurance premium and any uninsured medical or dental costs.

Appendix B

18. Commencing the first month following entry of this Order, LaChapelle and Ohanian shall reimburse Mitten for the cost of dependent COBRA medical insurance coverage, as long as that coverage is maintained.

19. LaChapelle shall add the minor child as a dependent to his medical coverage, as soon as possible, but no later than September 1, 1999. However, in the event that Mitten obtains more comprehensive dependent medical insurance, then Mitten shall obtain that insurance.

20. The party incurring the expense, either for insured or uninsured medical and dental expenses, shall provide the other two parties with written verification of these expenses on a regular basis, and shall accompany this verification with a written request for payment of a specific dollar amount. The party owing reimbursement shall pay the reimbursement with thirty (30) days of receipt of the verification of the amounts owed.

Day Care Costs

21. Commencing the first month immediately following this Order, Mitten shall provide LaChapelle and Ohanian documentation of Lauren's day care costs on a monthly basis. LaChapelle shall reimburse Mitten forty-five percent (45%) of Lauren's day care costs within thirty (30) days of receiving documentation from Mitten, and Ohanian shall reimburse Mitten forty-five percent (45%) of Lauren's day care costs within thirty (30) days of receiving documentation from Mitten.

Appendix B

Expert Witness Fees

22. Mitten, LaChapelle, and Ohanian shall equally divide the cost of Irvin's preparation for and attendance and testimony at trial. Any party who paid Irvin such costs in advance shall provide documentation of that payment to the other parties within thirty (30) days of the date of this Order. Any party who paid Irvin such costs in advance shall be entitled to reimbursement from any party who has not paid such costs within thirty (30) days of receiving documentation.

Name Change

23. There shall be no change in Lauren's name; her name shall remain Lauren Mitten Katherine Ohanian.

Parenting Consultant/Mediation Panel

24. Dr. Maddock shall continue as the parenting consultant. Nathanson shall continue as the guardian ad litem. In the event that either Dr. Maddock or Nathanson are not available to serve as the parenting consultant and guardian ad litem, the parties shall mutually agree upon another qualified individual. If the parties are unable to agree on a replacement, they shall alternate striking names from a list of four qualified individuals.

25. If the parties are unable to reach an agreement as to visitation or any other issue affecting Lauren, prior to submitting the dispute to any court, they are to submit their dispute to the guardian ad litem and the parenting

consultant who shall attempt to mediate an agreement. The parties shall share equally the cost of any such mediation and all costs of the parenting consultant and guardian ad litem from the date of this Order.

ORDER FOR JUDGMENT

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

Dated: June 3, 1999

s/ Philip D. Bush
Philip D. Bush
Judge of District Court

APPENDIX C — ORDER OF THE SUPREME COURT OF THE STATE OF MINNESOTA DENYING PETITION FOR FURTHER REVIEW DATED AND FILED MAY 16, 2000

STATE OF MINNESOTA
IN SUPREME COURT

C5-99-1304

In the Matter of:

Mark LaChapelle,

Respondent,

vs.

Denise Mitten,

Appellant.

In Re the Custody of: L.M.K.O.

Valerie Ohanian,

Respondent,

and

Denise Mitten,

Appellant,

and

Mark LaChapelle,

Respondent.

Appendix C

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Denise Mitten for further review be, and the same is, denied.

Dated: May 16, 2000

BY THE COURT:

s/ Kathleen A. Blatz
Kathleen A. Blatz
Chief Justice

APPENDIX D — ORDER OF THE SUPREME COURT OF THE STATE OF MINNESOTA DENYING MOTION TO SUSPEND MINN. R. CIV. APP. P. 140.01 DATED JUNE 27, 2000

STATE OF MINNESOTA
IN SUPREME COURT

C5-99-1304

In the Matter of:

Mark LaChapelle,

Respondent,

vs.

Denise Mitten,

Petitioner.

In Re the Custody of: L.M.K.O.

Valerie Ohanian,

Respondent,

and

Denise Mitten,

Petitioner,

and

Mark LaChapelle,

Respondent.

Appendix D

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the motion of Denise Mitten to suspend Minn. R. Civ. App. P. in the above-entitled matter be, and the same is, denied.

Dated: June 27, 2000

BY THE COURT:

s/ Kathleen A. Blatz
Kathleen A. Blatz
Chief Justice

Supreme Court, U.S.
FILED
OCT 2 0 2000
CLERK

(2)

No. 00-299

IN THE

Supreme Court of the United States

DENISE MITTEN,

Petitioner,

v.

MARK LaCHAPELLE, VALERIE OHANIAN and L.M.K.O.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA COURT OF APPEALS

BRIEF IN OPPOSITION FOR RESPONDENT VALERIE OHANIAN

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QUESTION PRESENTED

Petitioner has failed to establish that there is any conflict between the courts as to the appropriate standard governing *initial* custody determinations, or that the interest in the protection of children is not a compelling state interest. One of many factors in the best interests analysis is the proposed residence of the child. This factor alone bears on a number of related factors including the continuity and stability in the child's life, the opportunity to maintain significant familial ties, and the opportunity for meaningful visitation with the noncustodial parent. Upon analysis of the unique facts of each case, if a court determines that a proposed relocation is not in the best interests of the child, other jurisdictions have found that conditioning custody on the residence of the child is appropriate. Further, Petitioner has failed to offer any evidence that conditional custody awards in initial custody determinations have been found to be unconstitutional in any jurisdiction. The Petitioner's suit in this case, seeks to change the case-by-case "best interest" analysis into a "national standard" that focuses not on the best interests of the child, but on the interests of the proposed custodial parent. Accordingly, the question presented is:

Where the Minnesota Court of Appeals affirmed the trial court's decision in conditioning Petitioner's custody on maintaining the child's residence in Minnesota, and review was denied on two occasions by the Minnesota Supreme Court, was it correct in its holding that a restriction on a child's residence, when it is in the child's best interest, is not violative of the custodial parent's right to travel or the parent's right of privacy?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iv
Statement of the Case	2
A. Mitten And Ohanian Decide To Start A Family.	2
B. Mitten And Ohanian End Their Relationship And Ohanian Petitions For Joint Physical And Legal Custody.	4
C. The Parties Enter Into A Settlement Agreement.	6
D. After Extensive Testimony And Detailed Findings The Court Found That A Conditional Custody Award Is In The Child's Best Interests.	6
E. Mitten's Subsequent Appeals.	12
Reasons for Denying the Writ	12
I. Mitten Has Not Properly Challenged The Constitutionality Of Any Minnesota Statute.	12

Contents

Page

II. Mitten Has Failed To Establish That There Is Any Conflict Between The Courts As To The Appropriate Standard Governing Initial Custody Determinations. 14

III. The Trial Court's Order Restricting The Residence Of The Minor Child Does Not Impermissibly Burden Mitten's Right To Travel Nor Does It Impermissibly Infringe Upon Mitten's Fourteenth Amendment Privacy Concerns. 20

Conclusion 29

TABLE OF CITED AUTHORITIES

Page

Cases:

Benson v. Hackbarth, 481 N.W.2d 375 (Minn. Ct. App. 1992), *review denied*, (Minn. Apr. 27, 1992) 13

Brito v. Brito, 794 P.2d 1205 (N.M. Ct. App. 1990) 19

Burgess v. Burgess, 913 P.2d 473 (Cal. 1996) 15

Caban v. Mohammed, 441 U.S. 380 (1979) 26

Carlson v. Carlson, 661 P.2d 833 (Kan. Ct. App. 1983) 19, 21, 23, 24

Clark v. Atkins, 489 N.E.2d 90 (Ind. Ct. App. 1986) 19, 21, 23, 24, 25, 26, 27

Everett v. Everett, 660 So. 2d 599 (Ala. Civ. App. 1995), *reh'g denied*, (Feb. 17, 1995), *cert. denied*, (Apr. 12, 1995) 23

Frauenshuh v. Giese, No. C8-98-444, 1998 WL 481890 (Minn. Ct. App. Aug. 18, 1998), *rev'd and remanded on other grounds*, 599 N.W.2d 153 (Minn. 1999) 14, 22, 23

Garcia v. Garcia, 466 P.2d 554 (N.M. 1970) 14

Cited Authorities

Page

Hartman v. Hartman, 476 A.2d 938 (Pa. 1984) ... 14

In re Appeal of Leary, 272 Minn. 34, 136 N.W.2d 552 (1965) 13

In re Custody of D.M.G. and T.J.G., 951 P.2d 1377 (Mont. 1998) 21, 23, 26

In re Custody of L.J.G., 415 N.W.2d 564 (Wis. Ct. App. 1987) 23

In re Marriage of Francis, 919 P.2d 776 (Colo. 1996), *reh'g denied*, July 29, 1996 15

Jaramillo v. Jaramillo, 823 P.2d 299 (N.M. 1991), *reh'g denied*, Jan. 16, 1992 .....14, 16, 19

Lebowitz v. Lebowitz, 403 S.W.2d 871 (Tex. Ct. Civ. App. 1966) 19

Lehr v. Robertson, 463 U.S. 248 (1983) 26

McAlister v. Patterson, 299 S.E.2d 322 (S.C. 1982) 15, 16

Sebastian v. Sebastian, 524 N.E.2d 29 (Ind. Ct. App. 1988) 19

Shapiro v. Thompson, 394 U.S. 618, *overruled in part on other grounds, Edelman v. Jordan*, 415 U.S. 651 (1974) 20, 24

Cited Authorities

Page

Stangel v. Stangel, 355 N.W.2d 489 (Minn. Ct. App. 1984), *review denied* (Minn. Feb. 6, 1985) 16

Stevison v. Woods, 560 So. 2d 176 (Miss. 1990) .. 16

Troxel v. Granville, __ U.S. __, 120 S. Ct. 2054 (2000) 27, 28

Ziegler v. Ziegler, 691 P.2d 773 (Idaho Ct. App. 1985) 19, 21, 22, 23, 25

Zwernemann v. Kenny, 563 A.2d 1139 (N.J. Super. Ct. App. Div. 1989) 23

Statutes:

Minn. Stat. § 518.17 ..... 13, 16, 18

Minn. Stat. § 518.131 4

Rules:

Minn. R. Civ. App. P. 140.01 12

Minn. R. Civ. App. P. 144 ..... 13, 14

Minn. R. Civ. P. 24.04 ..... 13, 14

United States Supreme Court Rule 29(c) 14

United States Supreme Court Rule 29.4(c) 14

Cited Authorities

Page

Other Authorities:

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Respondent Valerie Ohanian ("Ohanian"), respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Minnesota Court of Appeals' decision in *LaChapelle v. Mitten*, 607 N.W.2d 151 (Minn. Ct. App. 2000), *review denied*, (Minn. May 16, 2000), *motion to suspend Minn. R. Civ. App. P. 140.01 denied*, (Minn. June 27, 2000). Contrary to Petitioner's argument, she has failed to establish that there is any conflict between the courts as to the appropriate standard governing *initial* custody determinations or that the interest in the protection of children is not a compelling state interest. In affirming the trial court's conditional custody award to Petitioner, the Minnesota Court of Appeals correctly held that a conditional custody order that restricts the residence of a child does not violate the proposed custodial parent's right to travel or right to privacy where the restriction on the child's residence is in the best interests of the child. Petitioner has failed to offer any evidence that such restrictions are unconstitutional. *See infra* at III. In fact, it appears that the state courts that have considered this issue have held that such restrictions are constitutionally permissible. Thus, as state courts have not applied conflicting standards as to the proper analysis of conditional initial custody orders and such restrictions have been held to be a constitutional restriction advancing the State's compelling interest in the protection of children's interests, this petition should be denied. Moreover, as there is nothing in the record that Petitioner has ever notified the Attorney General of the State of Minnesota as to her constitutional challenge, this petition should be denied.

STATEMENT OF THE CASE

A. Mitten And Ohanian Decide To Start A Family.

Appellant Denise Mitten ("Mitten") and Respondent Valerie Ohanian ("Ohanian") were same-sex partners in a relationship that lasted over ten years. Petition for Writ of Certiorari ("Petition for Writ"), Appendix ("App.") B, at 36a, Finding 2. During the course of their relationship, Mitten and Ohanian decided to start a family together. Through a mutual friend, they were introduced to Mark LaChapelle ("LaChapelle") and LaChapelle's life partner, Scott Brush ("Brush"). *Id.* In 1990, Mitten and Ohanian met with LaChapelle and Brush to discuss the possibility of conceiving a child through artificial insemination. All three parties entered into a written agreement whereby LaChapelle would donate sperm for the artificial insemination of Mitten and LaChapelle would waive all parental rights. *Id.* at 36a, Finding 3.

Mitten became pregnant in 1992, and she and Ohanian prepared for the birth of their child. In addition to discussing parenting issues and infant care, they entered into a second "Best Interests Agreement" with the assistance of an attorney to protect and promote Ohanian's relationship with the child. The Best Interests Agreement held both Mitten and Ohanian responsible for providing for the child's needs and declared that Mitten and Ohanian would be the parents of the child, and that they would share joint physical custody of the child in the event of a separation. This Agreement also provided that LaChapelle and Brush would be entitled to "have significant relationships" with the child, including regular visitation. The child, L.M.K.O., was born on January 4, 1993. *Id.* at 37a, Findings 5, 7.

After L.M.K.O's birth, Mitten and Ohanian petitioned for adoption, and the court granted the adoption in September 1993. Petition for Writ, App. B, at 37a. For the first three and one-half years of her life, L.M.K.O. was raised in Minneapolis, Minnesota, residing with her adoptive parent, Ohanian (whom she called "Mama"), and her biological mother, Mitten (whom she called "Mommy"). *Id.* at 53a. During this time, L.M.K.O. developed a very intimate relationship with both Mitten and Ohanian, and both parties were emotional parents to L.M.K.O. Petition for Writ, App. B, at 53a, Finding 61(d). An emotional parent is one to whom a child looks to for both comfort, solace, and security. *Id.* Mitten, Ohanian, and L.M.K.O. lived as a family for over three and one-half years, during which time Ohanian was the primary income earner who had provided for Mitten and L.M.K.O.'s support. Petitioner's assertion in her Petition for Writ of Certiorari that she "quit her job in order to be a stay-at-home-mom," is not true and has never been apart of the record. Moreover, Mitten's assertion that Ohanian did not become involved in the legal proceedings until Mitten secured employment in rural Michigan is also contrary to the facts contained in the record. Ohanian has been intimately involved as a parent throughout L.M.K.O.'s life, and has been involved in these legal proceedings since her petition to adopt L.M.K.O.'s was filed in 1993.

LaChapelle and Brush had enjoyed frequent visitation with L.M.K.O from birth until August 1994. At that point, Mitten terminated LaChapelle's visitation with L.M.K.O. due to rising tension between the parties. Petition for Writ, App. at 38a, Finding 10. Following the termination of his visitation, LaChapelle brought a motion to vacate the adoption order and to adjudicate LaChapelle as the biological father of L.M.K.O. The adoption order was vacated on

August 7, 1995, and temporary legal and physical custody was granted to Mitten. *Id.* at 38a, Finding 12.

B. Mitten And Ohanian End Their Relationship And Ohanian Petitions For Joint Physical And Legal Custody.

Mitten and Ohanian ended their relationship during the spring of 1996. Petition for Writ, App. B, at 39a. Later that year, Mitten sought permission from the court to move her residence to Hersey, Michigan for employment reasons. At the same time, Ohanian petitioned the Court for joint legal and joint physical custody of L.M.K.O. Petition for Writ, App. B, at 40a. On August 30, 1996, the trial court denied Ohanian's custody motion as premature and granted Mitten permission to temporarily move her residence to Michigan.[1] *See* Petition for Writ, App. A, at 15a-16a. To protect Ohanian's and LaChapelle's rights to see L.M.K.O. pending a determination on custody, the court also ordered the parties to select a Visitation Expeditor to establish a schedule for temporary visitation. Petition for Writ, App. B, at 40a, Finding 23.

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1. Minnesota Statutes section 518.131 allows the court, in a custody proceeding, to grant temporary custody to one parent pending the final disposition of the proceeding. Minn. Stat. § 518.131, subd. 1. Unless modified, the temporary order continues in effect until entry of a final decree and a temporary order "[s]hall not prejudice the rights of the parties or the child which are to be adjudicated at subsequent hearings in the proceeding." Minn. Stat. § 518.131, subd. 5, 9(a). Although Mitten later argued that the trial court's order was not temporary, the Minnesota Court of Appeals held that any ambiguity in the trial court's order "was resolved against Mitten in the June 1997 order by the same judge who issued the earlier order." Petition for Writ, App. A, at 16a.

After living in rural Michigan for only one year, Mitten was terminated from her full-time employment. Following this termination, Mitten was unable to secure full-time employment in Michigan. Petition for Writ, App. B, at 46a-47a, Finding 38. However, Mitten continued to reside in rural Michigan with L.M.K.O pending the custody proceedings in Minnesota. Petition for Writ, App. B, at 46a-47a. The court entered an order on April 3, 1997, granting Ohanian and LaChapelle monthly interim visitation for one four-day weekend per month alternating between Michigan and Minnesota.

Hersey, Michigan is a very rural area with no practical places for Ohanian and LaChapelle to stay within L.M.K.O.'s community. Petition for Writ, App. B at 48a, Finding 43. The parties have had to stay in hotels and college dormitories. While Mitten resided in Michigan, neither Ohanian nor LaChapelle knew where Mitten lived with L.M.K.O. Petition for Writ, App. B, at 48a, Finding 44. Mitten refused to permit either party from picking up L.M.K.O. at her home. Instead, the parties were required to meet L.M.K.O. at a car wash. Moreover, Mitten did not even permit the parties to visit with L.M.K.O. during school or community events. Both the cumbersome logistics of the visitation and Mitten's refusal to allow the parties to have any meaningful visitation with L.M.K.O., have deprived L.M.K.O. of regular and frequent contact with both Ohanian and LaChapelle. Petition for Writ, App. B, at 49a, Finding 48. With L.M.K.O. now in school, frequent trips or visitation with Ohanian and LaChapelle would be extremely difficult if she resided in Michigan, and the travel requirements would be onerous. This finding of the trial court was supported by the testimony of the guardian ad litem (Nathanson), as well as the independent custody and visitation expert (Dr. Irvin)

appointed by the trial court. Petition for Writ, App. B, at 49a-50a, Findings 50, 51. "The location of L.M.K.O.'s residency and the manner in which visitation occurs, especially during the next few years, will greatly impact L.M.K.O.'s relationship with each of her three parents." Petition for Writ, App. B, at 51a, Finding 58.

C. The Parties Enter Into A Settlement Agreement.

Prior to commencement of trial, Mitten and Ohanian agreed to share joint legal custody and the court approved their agreement as in L.M.K.O.'s best interests. Petition for Writ, App. B,. at 44a-46a. That agreement also provided LaChapelle the opportunity to provide input on significant decisions involving L.M.K.O., including education, medical care, childcare, religious training, and extracurricular activities. Petition for Writ, App. B at 44a. Additionally, LaChapelle was to be provided access to information and records pertaining to L.M.K.O.'s education, activities, medical and dental care, and other significant information. *Id.* at 45a. Mitten, through counsel, acknowledged and conceded the parties' agreement in her post-trial memorandum to the district court. Petition for Writ, App. A at 11a-12a.

D. After Extensive Testimony And Detailed Findings The Court Found That A Conditional Custody Award Is In The Child's Best Interests.

After a trial in February 1999, the court awarded sole physical custody of L.M.K.O. to Mitten on the condition that Mitten provide a permanent residence for L.M.K.O. in Minnesota. Petition for Writ, App. B, at 56a. The court found that the parties had agreed before trial that Mitten and

Ohanian would have joint legal custody of L.M.K.O., and the court ruled that such custody was in L.M.K.O.'s best interests. *Id.* The court found that LaChapelle's and Ohanian's relationships with L.M.K.O. could not be maintained or further developed with continued visitation in rural Michigan. Specifically, the court found as follows:

> - LaChapelle and Ohanian travel to Michigan every other month for a three-four day visitation period with L.M.K.O. On the alternating months, L.M.K.O. travels to the Twin Cities for visitation with LaChapelle and Ohanian. Petition for Writ, App. B, at 47a, Finding 39.
>
> - Hersey, Michigan is a rural area. Generally, when LaChapelle and Ohanian have visitation in Michigan, they must fly to the Reed City airport, rent a car, and drive two to three hours to Hersey. . . . Petition for Writ, App. B, at 47a, Finding 40.
>
> - LaChapelle and Ohanian do not know exactly where L.M.K.O. lives—they have never been to or seen Mitten's home. Generally, when Mitten and Ohanian meet to exchange L.M.K.O. for visitation, they meet at a car wash some distance from Mitten's home. Mitten has been reluctant to (and generally has not permitted) Ohanian or LaChapelle to meet [L.M.K.O.] at other places such as [L.M.K.O.]'s school, a social event, a community event, or an extracurricular activity. Petition for Writ, App. B, at 48a, Finding 44.

- Both the logistics of the visitation and Mitten's reluctance to allow LaChapelle and Ohanian to attend [L.M.K.O.]'s school and extracurricular activities have prevented LaChapelle and Ohanian from becoming integrated in [L.M.K.O.]'s Michigan community. Petition for Writ, App. B, at 48a, Finding 45.

- Due to the logistics and artificial settings where the visitation occurs (college dormitories, cabins, and hotels), LaChapelle and Ohanian's visitation with [L.M.K.O.] in Michigan is not conducive to maintaining or further developing their parental roles and relationship with [L.M.K.O.]. Petition for Writ, App. B, at 49a, Finding 46.

- Were [L.M.K.O.]'s residence to remain in Michigan, this Court is hard pressed to see how a meaningful parental relationship could be maintained between [L.M.K.O.] and LaChapelle or Ohanian. Petition for Writ, App. B, at 49a, Finding 47.

- [L.M.K.O.]'s residency in Hersey, Michigan has denied LaChapelle and Ohanian regular and frequent contact with [L.M.K.O.]. Likewise, [L.M.K.O.] has been denied regular and frequent contact with LaChapelle and Ohanian. Petition for Writ, App. B, at 49a, Finding 48.

- Irvin [Dr., custody and visitation expert appointed by the court] testified that her first request would be to have Mitten and [L.M.K.O.] move back to the Twin Cities metro area; or, in the alternative, Mitten and [L.M.K.O.] should move to a location with (sic) two hours of the Twin Cities metro area. Irvin ultimately recommended that [L.M.K.O.] live in the Twin Cities. Petition for Writ, App. B, at 49a, Finding 50.

- Nathanson [guardian ad litem] testified that although [L.M.K.O.]'s experience in Michigan has been a good one, it is in [L.M.K.O.]'s best interest to move back to Minnesota and that the move should occur before [L.M.K.O.] enters first grade. Petition for Writ, App. B, at 50a, Finding 51.

- Life would be easier for [L.M.K.O.] if she did not have to travel. Moreover, the less travel obstacles that exist for [L.M.K.O.] to have visitation with each of her parents, the more contact [L.M.K.O.] will have with each of her parents and the better off [L.M.K.O.] will be. Petition for Writ, App. B, at 50a, Finding 55.

- [L.M.K.O.] has substantial ties in the Twin Cities area, including family and friends. Petition for Writ, App. B, at 50a, Finding 56.

- Irvin testified that [L.M.K.O.] hard (sic) time figuring out what she is feeling and what makes her happy. Irvin also testified that

[L.M.K.O.] stands less of a chance of this occurring if she were to live in LaChapelle and Ohanian's community (the Twin Cities). Petition for Writ, App. B, at 50a, Finding 57.

- In most custody/visitation decisions, a court need only allocate custody and visitation between two parents; however, the circumstances of this case are unique. The fact that visitation must be arranged between three parents each month, several times a month, greatly compounds the problems created by the distance between Michigan and Minnesota. When this Court previously granted Mitten's request to move to Michigan, it was not known at that time how custody and visitation would be allocated between the three adults. Since then, and through the course of this trial, the Court has become acutely aware of how significant [L.M.K.O.]'s relationship is with Mitten, LaChapelle, and Ohanian. This Court is also acutely aware of how the distance between Michigan and Minnesota has impacted [L.M.K.O.]'s life and her relationship with each of these adults. Were [L.M.K.O.] to remain in Michigan, it is not likely that she would be able to maintain meaningful, intimate relationships with Ohanian and LaChapelle. The location of her residency and the manner in which visitation occurs, especially during the next few years will greatly impact [L.M.K.O.]'s relationship with each of these three adults. Neither Mitten's desire to live in rural Michigan nor

> the convenience and expense incurred by LaChapelle and Ohanian in visiting [L.M.K.O] there are the primary factors with which this Court bases its decision. Instead, this Court looks at [L.M.K.O.]'s best interests in deciding how custody, visitation, and her residency can provide meaning, positive, parental relationships with each of her three parents. Petition for Writ, App. B, at 51a, Finding 58.
>
> - Dr. Irvin testified that [L.M.K.O.] needs at least monthly contact with LaChapelle and Ohanian, and she recommended weekly contact with LaChapelle and Ohanian if [L.M.K.O.] were to reside in Minnesota. Petition for Writ, App. B, at 57a, Finding 65.
>
> - Nathanson [guardian ad litem] testified that ordinary, day to day contact with all three parents should be explored. Petition for Writ, App. B, at 57a, Finding 66.
>
> - It is in [L.M.K.O.]'s best interest to have weekly in person contact with LaChapelle and Ohanian after September 1, 1999. Petition for Writ, App. B, at 57a, Finding 69.

Contrary to Mitten's assertions, the court did not require L.M.K.O. to live in Minnesota based "purely upon its determination that if she lived there she could maintain a relationship with Mitten, Ohanian, and LaChapelle." Petition for Writ at 6. Rather, the court found that it was in L.M.K.O.'s *best interests* that she reside in Minnesota based on a variety

of factors including L.M.K.O.'s substantial ties in the Twin Cities area, including family and friends, and L.M.K.O.'s ability to maintain positive parental relationships with each of her three parents. Petition for Writ, App. B, at 51a, Finding 58.

E. Mitten's Subsequent Appeals.

Mitten appealed the grant of joint legal custody, conditional sole physical custody, the final awards, and the denial of the name change. On March 14, 2000, the Minnesota Court of Appeals affirmed the district court's decision granting Mitten sole physical custody on the condition that she move back to Minnesota, and granting Mitten and Ohanian joint legal custody with LaChapelle having the right to participate in important decisions affecting L.M.K.O. Petition for Writ, App. A, at 31a. On April 11, 2000, Mitten petitioned the Minnesota Supreme Court for review of the Court of Appeals decision dated March 14, 2000. Mitten's request was summarily denied on May 16, 2000. Mitten then brought a motion for the Minnesota Supreme Court to suspend Rule 140.01 of the Minnesota Rules of Civil Appellate Procedure to allow for a reconsideration of her petition for review. That petition was denied on June 27, 2000.

REASONS FOR DENYING THE WRIT

I. MITTEN HAS NOT PROPERLY CHALLENGED THE CONSTITUTIONALITY OF ANY MINNESOTA STATUTE.

While she does not explicitly argue that a specific Minnesota statute is unconstitutional, Mitten does implicitly argue that a national custody standard should replace the

best interests standard set forth in Minnesota Statute § 518.17 because the current standard infringes upon her constitutional right of privacy and right to travel. Petition for Writ at 15. Mitten argues that the trial court's conditional custody order violates her constitutional right of privacy and right to travel because the current statutory scheme allows family courts to "second-guess a parent's decision where to raise his or her child." Petition for Writ at 17. However, there is no indication in the record that Mitten ever notified the attorney general that the constitutionality of any statute was being challenged as required by Minn. R. Civ. P. 24.04 and Minn. R. Civ. App. P. 144 throughout these proceedings.

Rule 24.04 of the Minnesota Rules of Civil Procedure provides that "[w]hen the constitutionality of an act of the legislature is drawn in question . . . . the party asserting the unconstitutionality of the act shall notify the attorney general thereof within such time as to afford the attorney general an opportunity to intervene." Minn. R. Civ. P. 24.04; *see also* Minn. R. Civ. App. P. 144 (requiring similar notice to attorney general on appeal). The Minnesota Supreme Court has held, "In absence of compliance, we will not consider the constitutionality of a statute." *In re Appeal of Leary*, 272 Minn. 34, 47, 136 N.W.2d 552, 560 (1965); *see also Benson v. Hackbarth*, 481 N.W.2d 375, 379 (Minn. Ct. App. 1992), *review denied*, (Minn. Apr. 27, 1992) (where the attorney general is not notified that the constitutionality of a statute is being challenged, the case will not be reviewed on appeal).

The United States Supreme Court has a similar rule that provides:

> In any proceeding in this Court wherein the constitutionality of any statute of a State drawn

> in question, and the state or any agency, officer, or employee thereof is not a party, the initial pleading, motion or paper in this Court shall recite that 28 U.S.C. § 2403(b) may be applicable *and shall be served upon the Attorney General of the State.*

Sup. Ct. R. 29(c) (emphasis added). Again, Mitten has failed to comply with the notice requirements under the Rules of this Court. Thus, in the absence of compliance with the notifications required by Minnesota Rules of Civil Procedure 24.04, Minnesota Rules of Civil Appellate Procedure 144, and Supreme Court Rule 29.4(c), the constitutionality of any Minnesota Statute in this case should not be considered.

II. MITTEN HAS FAILED TO ESTABLISH THAT THERE IS ANY CONFLICT BETWEEN THE COURTS AS TO THE APPROPRIATE STANDARD GOVERNING INITIAL CUSTODY DETERMINATIONS.

The "best interests" standard is "the lodestar for determining a custody award." *Jaramillo v. Jaramillo*, 823 P.2d 299, 302 (N.M. 1991), *reh'g denied*, Jan. 16, 1992. This is true in Minnesota, and "probably for all jurisdictions in this country." *Id.* (citing *Garcia v. Garcia*, 466 P.2d 554, 566 (N.M. 1970) (referring to "the universal rule that the best interests of the child are paramount"); *Frauenshuh v. Giese*, 599 N.W.2d 153, 158-59 (Minn. 1999) (best interests of child are "paramount" concern in resolution of custody issues); *Hartman v. Hartman*, 476 A.2d 938, 939 (Pa. 1984) ("It is well-established that the sole criterion in child custody decisions is the best interests and welfare of the child."). Mitten argues that this Court should set forth a national

standard in determining custody issues with bright line rules that focus on the custodial parent's needs, rather than the best interests of the child. Bright line rules regarding relocation issues in initial custody determinations, however, are inappropriate — each case must be evaluated on its own unique facts. *See Burgess v. Burgess*, 913 P.2d 473, 483 (Cal. 1996).

Mitten's argument that state courts are in conflict as to the appropriate standard to apply when initially determining the residence of a minor child, is unpersuasive. In support of her argument, Mitten cites a handful of state court decisions. However, those decisions do not support her argument because they either involve a *modification* of an *existing* custody award,[2] or the cases clearly support the trial court's conclusion that in an *initial* custody determination, the determination of a minor child's residence is subject to the best interests standard.[3]

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2. Mitten appeals from the trial court's *initial* custody determination. The modification of an *existing* custody award requires a heightened standard in many jurisdictions. *See In re Marriage of Francis*, 919 P.2d 776 (Colo. 1996), *reh'g denied*, July 29, 1996 (endangerment standard applied to determination as to a change in custody of children based on proposed relocation); Janet Leach Richards, Children's Rights v. Parent's Rights: A Proposed Solution to the Custodial Relocation Conundrum, 29 N.M. L. Rev. 245, 248 (Spring 1999) (where relocation precipitates a petition for a change of custody, the court applies the appropriate statutory standard).

3. *See Burgess v. Burgess*, 913 P.2d 473, 483 (Cal. 1996) (in *initial* custody determinations, trial court must look to all circumstances bearing on best interest of minor child, including residence, community ties, health and educational needs); *McAlister*

(Cont'd)

Under Minnesota law, the proposed change of residence by one party in an initial custody proceeding is treated by the trial court as a factor to balance in determining the custody of the child. *Stangel v. Stangel*, 355 N.W.2d 489, 490 (Minn. Ct. App. 1984), *review denied* (Minn. Feb. 6, 1985). In *Stangel*, the trial court bifurcated the questions of custody and a proposed move to Louisiana by the mother. The trial court first determined who should have custody, and then it considered the proposed move. However, the Minnesota Court of Appeals noted that the court should have treated the proposed move as simply another factor to balance in determining who should have custody under Minn. Stat. § 518.17. *Stangel*, 355 N.W.2d at 490. The child's residence bears directly on several of the best interest factors in Minnesota Statutes Section 518.17.[4]

(Cont'd)
v. Patterson, 299 S.E.2d 322 (S.C. 1982) (conditional custody award based on mother's residence within same county held to be in the child's best interests); *Jaramillo v. Jarmillo*, 823 P.2d 299 (N.M. 1991), *reh'g denied*, Jan. 16, 1992 (evidence supported finding that moving to New Hampshire would be in the best interests of the child); *Stevison v. Woods*, 560 So. 2d 176 (Miss. 1990) (parent's move to Alaska with child justified change of custody where move had adverse effect on child's welfare); Carol S. Bruch & Janet M. Bowermaster, The Relocation of Children and Custodial Parents: Public Policy, Past and Present, 30 Fam. L.Q. 245, 263 ("[a]n initial custody decision between parents is, of course, handled with the best interest standard").

4. Minnesota Statutes section 518.17 provides in pertinent part:

> Subdivision 1. The best interests of the child. (a) "The best interests of the child" means all relevant factors to be considered and evaluated by the court including:
>
> (Cont'd)

(Cont'd)

(1) the wishes of the child's parent or parents as to custody;

(2) the reasonable preference of the child, if the court deems the child to be of sufficient age to express preference;

(3) the child's primary caretaker;

(4) the intimacy of the relationship between each parent and the child;

(5) the interaction and interrelationship of the child with a parent or parents, siblings, and any other person who may significantly affect the child's best interests;

(6) the child's adjustment to home, school, and community;

(7) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;

(8) the permanence, as a family unit, of the existing or proposed custodial home;

* * *

If the court awards joint legal or physical custody over the objection of a party, the court shall make detailed findings on each of the factors in this subdivision and explain how the factors led to its determination that joint custody would be in the best interests of the child.

(Cont'd)

> The factors stressing stability and continuity of care are of particular importance in light of a parent's proposed move to another state. Also important are the intimacy of the relationships between each parent and the child; the interaction of the child with parents and other people who affect the child's best interests; the child's adjustment to home, school, and community; and the permanence, as a family unit, of the existing or proposed custodial home.

Petition for Writ, App. A, at 17a (citing Minn. Stat. § 518.17, subd. 1(a)(4)-(8) (1998)).

In making this initial custody determination, the overwhelming majority of jurisdictions follow a best interest

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(Cont'd)

> Subd. 3. Custody order. (a) Upon adjudging the nullity of a marriage, or in a dissolution or separation proceeding, or in a child custody proceeding, the court shall make such further order as it deems just and proper concerning:
>
> (1) the legal custody of the minor children of the parties which shall be sole or joint;
>
> (2) their physical custody and residence; and
>
> (3) their support. In determining custody, the court shall consider the best interests of each child and shall not prefer one parent over the other solely on the basis of the sex of the parent.

Minn. Stat. § 518.17 (1999).

approach. *See Jaramillo*, 823 P.2d at 302. A determination of a child's best interests includes findings as to the minor child's residence. A trial court is given wide discretion in fashioning custody awards, and may appropriately determine to condition custody if the conditions serve the best interests of the child.[5] For example, in *Sebastian v. Sebastian*, 524 N.E.2d 29, 33 (Ind. Ct. App. 1988), the Indiana Court of Appeals upheld the trial court's discretion to condition the mother's custody of her child on the mother's return to the United States from Japan where she was stationed in the Air Force. Although the court noted that while there were no reported Indiana cases awarding custody to a parent who resides in a foreign country, custody is often awarded to a parent who resides in or moves to another state *if it is in the best interests of the child to do so. Id.* (emphasis added) (citations omitted).

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5. *See Clark v. Atkins*, 489 N.E.2d 90 (Ind. Ct. App. 1986) (trial court could award custody of the children to mother in Oklahoma but condition custody on her return to Indiana with her children when she graduated from school); *Ziegler v. Ziegler*, 691 P.2d 773 (Idaho Ct. App. 1985) (trial court could properly give custody of child to wife subject to limitation that she not remove child from the United States and not take the child to reside anywhere beyond a one hundred mile radius of the city without court order); *Carlson v. Carlson*, 661 P.2d 833 (Kan. Ct. App. 1983) (trial court could place a restriction on wife's custody of children that she remain in county); *Lebowitz v. Lebowitz*, 403 S.W.2d 871, 874 (Tex. Ct. Civ. App. - 1966) (relying on court's authority to "make such orders regarding custody and support of each such child or children, as is for the best interest of same: in upholding residency restriction contained in custody award; the trial judge's added restriction did not contravene the jury determination to award custody without the restriction); *Brito v. Brito*, 794 P.2d 1205, 1209 (N.M. Ct. App. 1990) (upholding custody award contingent on maintaining child's residence with relative to serve child's best interests).

Here, Mitten's proposed change in residence was but one factor in the court's best-interests analysis. The trial court's best interest finding is amply supported by the factual findings as well as the express recommendations and conclusions of a court appointed independent custody and visitation expert and a court appointed guardian ad litem both of whom testified at trial. L.M.K.O.'s guardian ad litem plainly concluded that it was in L.M.K.O.'s best interests to remain in Minnesota where she can enjoy regular and frequent contact with Ohanian and LaChapelle. Petition for Writ, App. B, at 49a-50a, Findings 50-51.

III. THE TRIAL COURT'S ORDER RESTRICTING THE RESIDENCE OF THE MINOR CHILD DOES NOT IMPERMISSIBLY BURDEN MITTEN'S RIGHT TO TRAVEL NOR DOES IT IMPERMISSIBLY INFRINGE UPON MITTEN'S FOURTEENTH AMENDMENT PRIVACY CONCERNS.

In her petition, Mitten asserts that the trial court's conditional custody order is an unconstitutional deprivation of her constitutional right to travel. *See* Petition for Writ, at 11. In *Shapiro v. Thompson*, this Court stated that the compelling-state-interest test would be triggered by any classification which serves to burden the exercise of the right to travel. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969), *overruled in part on other grounds, Edelman v. Jordan*, 415 U.S. 651 (1974).

While it is recognized that citizens of this nation ordinarily have the constitutional right to travel from one state to another and to take up residence in the state of one's choice, there is also recognized a compelling state interest in restricting the residence of a custodial parent where it is

in the best interests of the child.[6] As to a custodial parent, "such person may be required to forego or forfeit some rights to custody or visitation, as the case may be, consistent with the best interests and welfare of the children and the rights of the other parent. *Carlson v. Carlson*, 661 P.2d 833 (Kan. Ct. App. 1983). In *Carlson*, the mother was required to move her residence from the state of Arizona to McPherson County, Kansas, because the trial court found that it was in the best interests of the children that they reside in McPherson County. *Id.* at 835. The mother argued that the restriction violated her constitutional right to travel. In rejecting this argument, the Kansas Court of Appeals recognized a legitimate state interest in restricting the residence of a custodial parent. *Id.* As the court in *Ziegler v. Ziegler*, 691 P.2d 773 (Idaho Ct. App. 1985), explained:

> In virtually every case of divorce where young children are involved they are the innocent victims. There is no dispute that the best interest of the children dictates that they should have the love, support, guidance and companionship of both their parents. Such affords the greatest probability that the child will mature into a happy, useful, law-abiding and productive citizen capable

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6. *See In re Custody of D.M.G. and T.J.G.*, 951 P.2d 1377, 1382-83 (Mont. 1998) (the furtherance of the best interests of children may constitute a compelling state interest worth of reasonable interference on a parent's right to travel); *Clark v. Atkins*, 489 N.E.2d 90, 100 (Ind. Ct. App. 1986) (in upholding conditional custody determination, the court found that there are few objectives more compelling than protecting the interests of children); *Carlson v. Carlson*, 661 P.2d 833, 835 (Kan. Ct. App. 1983) (citations omitted) (mother's right to travel was only limited by her desire to retain status as the custodial parent).

> of forming a part of a strong society and producing progeny in a like mold. The courts in divorce and child custody situations cannot guarantee these desirable results but it is the responsibility of the courts to take appropriate action to foster and promote such results when it appears that the parents because of the animosities between them are not going to cooperate in an effort to attain such goals. Providing and assuring the maximum opportunities for parental love, guidance, support and companionship is a compelling state interest that in my opinion warrants reasonable interference with the constitutional right of travel when necessary.

Ziegler, 691 P.2d at 780.

While no Minnesota court has specifically addressed the constitutionality of a contingent custody order,[7] Mitten's

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7. The only contingent custody order addressed by the Minnesota appellate courts was upheld without any challenge as to Constitutional concerns. *See Frauenshuh v. Giese*, No. C8-98-444, 1998 WL 481890, at *3 (Minn. Ct. App. Aug. 18, 1998), *rev'd and remanded on other grounds*, 599 N.W.2d 153 (Minn. 1999). In *Frauenshuh*, the court conditioned its custody award to the mother upon her return to the city where she had previously resided with the child's father. *Id.* The trial court concluded that it was in "the child's best interest to live with [his mother] in Ortonville but that if this is not possible, it is in the child's best interest to live in Ortonville with [his father]. *Id.* In her appeal, the mother did not advance a constitutional argument, but instead argued that it was "illogical" to conclude that a child could be "so irreversibly tied to a school and community that his best interests are better served by switching his physical custodian" than by living with the child's (Cont'd)

constitutional challenges are not novel issues in other states' appellate courts. Many other jurisdictions have addressed this issue and under similar factual circumstances, have upheld the constitutionality of conditional custody awards. *See, e.g.*, *Carlson v. Carlson*, 661 P.2d 833, 836-37 (Kan. 1983) (affirming residence restriction as in state's "legitimate interest" to promote children's best interests); *Clark v. Atkins*, 489 N.E.2d 90, 100 (Ind. Ct. App. 1986) (upholding order that mother return to state of children's previous residence to retain custody); *In re Custody of D.M.G. and T.J.G.*, 951 P.2d 1377 (Mont. 1998) (declaring that residence restrictions survive constitutional attack when there is "sufficient proof" the restriction is in child's best interests); *Everett v. Everett*, 660 So. 2d 599 (Ala. Civ. App. 1995), *reh'g denied*, (Feb. 17, 1995), *cert. denied*, (Apr. 12, 1995) (rejecting constitutional challenge to residence restriction); *Ziegler v. Ziegler*, 691 P.2d 773 (Idaho Ct. App. 1985) (finding state's "compelling governmental interest" justifies restriction on mother's right to travel). *See also Zwernemann v. Kenny*, 563 A.2d 1139, 1141 (N.J. Super. Ct. App. Div. 1989) (rejecting constitutional attack on state statute requiring parental consent to remove child from jurisdiction); *In re Custody of L.J.G.*, 415 N.W.2d 564, 567 (Wis. Ct. App. 1987) (rejecting constitutional attack to non-custodial parent's visitation residence restriction).

Specifically, in *Carlson v. Carlson*, the Kansas Court of Appeals upheld the trial court's custody award requiring the custodial mother to reside in the same county as the non-

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primary parent in another community. *Id.* In rejecting the mother's arguments, the Minnesota Court of Appeals explicitly upheld the trial court's authority to conditio custody on returning the child to his former city of residence. *Id.* at *1.

custodial father. *Carlson*, 661 P.2d at 837. On appeal, the mother claimed that the residency restriction violated her "constitutional right to travel" and the "equal protection clause" by failing to impose the same residency restriction on the non-custodian father. *Id.* at 836. In rejecting the mother's first constitutional challenge, the Kansas Court of Appeals stated:

> While we recognize that citizens of this nation ordinarily have the constitutional right to travel from one state to another and to take up residence in the state of one's choice, we also recognize a legitimate state interest in restricting the residence of a custodial parent. . . . "Of primary concern are the best interests and welfare of the children; all other issues are subordinate." . . . *[The mother]'s right to travel or even establish residence elsewhere is limited only by her desire to retain her status as the custodial parent.*

Id. (emphasis added, citation omitted).

In *Clark v. Atkins*, the Indiana Court of Appeals rejected a mother's constitutional challenge of an order granting her custody of the parties' minor children, provided that the mother return with the children to Indiana upon completion of education at an Oklahoma college. *Clark*, 489 N.E.2d at 100. Similar to this case, the *Clark* mother had moved from Indiana to Oklahoma with the children two years previously. *Id.* at 92. The Indiana Court of Appeals upheld the residency restriction. *Id.* Citing *Shapiro v. Thompson*, 394 U.S. at 634, the court stated that to withstand mother's constitutional attack the trial court's custody order restricting her right of travel must satisfy a "*compelling government objective.*"

Clark, 489 N.E.2d at 99 (emphasis added). In summarily dismissing the mother's constitutional challenge, the court reasoned:

> The straightforward answer to [the mother]'s argument is that the court's order does not impose any unnecessary burden whatever upon her right to travel. She remains free to where she may choose. *It is only the children who must be returned to Indiana.*

Id. at 100 (citing *Carlson*, 661 P.2d 833 and *Ziegler*, 691 P.2d 773) (emphasis added).

Here, the Minnesota Court of Appeals noted that the "trial court specifically found that it would be in L.M.K.O.'s best interests to reside in Minnesota where she could maintain a relationship with Mitten as her biological mother, Ohanian as her 'emotional parent,' and LaChapelle as her biological father." Petition for Writ, App. A, at 21a. The trial court did not restrict Mitten's right to remain in Michigan, the court only required that L.M.K.O. be returned to Minnesota. Any burden on Mitten's right to travel arises from her desire to remain L.M.K.O.'s sole physical custodian. The evidence in this case clearly supports the trial court's determination that some reasonable interference with unrestricted rights of travel is necessary. The parties' relationships were acrimonious and all parties expressed a very strong attachment and desire to be a part of L.M.K.O.'s life. The facts of this case certainly support the trial court's inference and conclusion that L.M.K.O. would suffer emotional harm if she was deprived visitation with Ohanian and LaChapelle and thus deprived of the parental love, affection, support, guidance and companionship to which she is entitled. Mitten

is free to change her place of residence without permission or order of the Court at any time if she should decide that it was not necessary that L.M.K.O. reside with her. The only restriction the trial court imposed was the residence of L.M.K.O.

Although the United States Supreme Court has recognized parental liberty interests, these interests have never been absolute. In *Lehr v. Robertson*, 463 U.S. 248 (1983), for example, the Court held that a putative biological father who had never established an actual relationship with his child did not have a constitutional right to notice of his child's adoption by the man who had married the child's mother. As the Court recognized previously, a parent's liberty interests " 'do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.' " *Id.* at 260 (quoting *Caban v. Mohammed*, 441 U.S. 380, 397 (1979)).

Under the facts of this case, Mitten and Ohanian made a decision during their relationship to begin a family. For the first half of her life, L.M.K.O. received daily care and parental guidance from both Mitten and Ohanian, and Mitten and Ohanian have both developed a significant parental relationship with the child. Petition for Writ, App. B, at 51a, 53a, Findings 58, 61(c). A custodial parent's liberty interests are "qualified by the special obligations of custody, the State's interest in protecting the best interests of the children and by the competing interests of the noncustodial parent." *In re Custody of D.M.G. and T.J.G.*, 951 P.2d 1377, 1381 (Mont. 1998). There are few objectives more compelling than the protections of the interests of children. *Clark v. Atkins*, 489 N.E.2d at 100. In *Clark*, the mother was granted legal and physical custody of the children, but the trial court

required her to return to Indiana with her children upon graduation from Oklahoma College. *Id.* The Indiana Court of Appeals noted that "to withstand a constitutional attack, a restriction on the right to travel must be necessary to a compelling governmental objective", and that "the law has few objectives more compelling than protecting the interests of the children." *Id.* Under the facts of that case, the court held that the trial court's order did not impose any necessary burden on Clark's right to travel because the children's residence was restricted, not Clark's — she remained free to live wherever she chose. *Id.*

Here, the trial court specifically found that it was in L.M.K.O.'s best interests to live in Minnesota where she could maintain her relationship with Ohanian as her "emotional parent," and LaChapelle as her biological father. As the Minnesota Court of Appeals held, "Minnesota's interest in protecting L.M.K.O.'s best interests is compelling and justifies intrusion into Mitten's privacy in her familial relationship with L.M.K.O." Petition for Writ, App. A, at 22a. Justice Stevens' dissent in *Troxel v. Granville*, __ U.S. __, 120 S. Ct. 2054 (2000), is particularly instructive in his discussion of the importance of examining the unique facts of each particular case in the determination of familial issues:

> The almost infinite variety of family relationships that pervade our ever-changing society strongly counsel against the creation by this Court of a constitutional rule that treats a biological parent's liberty interest in the care and supervision of her child as an isolated right that may be exercised arbitrarily. It is indisputably the business of the States, rather than a federal court employing a

> national standard, to assess in the first instance the relative importance of the conflicting interests that give rise to disputes such as this.

Id. at 2073.

The courts that have examined this issue have held that the interest in the protection of children is a compelling state interest. Again, Petitioner has failed to offer any evidence that the interest in the protection of children is not a compelling state interest. One of many factors in the analysis to determine the *initial* custody of a child is the proposed residence of the child. This factor alone bears on a number of related factors including the continuity and stability in the child's life, the opportunity to maintain significant familial ties, and the opportunity for meaningful contact with the child's emotional parent. Upon analysis of the unique facts of this case, the trial court determined that to continue the temporary residence and custody in Michigan was not in the best interests of L.M.K.O. Rather than focusing on her child's best interests, Mitten is asking this Court to toss out the "best interests of the child" standard, in favor of a "national standard" focusing instead on the best interests of the custodial parent. In *Troxel v. Granville*, this Court recognized the importance of deciding visitation issues on a case-by-case basis at the state-court level rather than imposing a national *per se* standard. *Troxel*, 120 S. Ct. at 2064. Similarly, an initial custody determination must take into account a multitude factors based on the unique circumstances of each case based on the best interests of the minor child. Rather than focusing on the breadth of factors that relate to the protection of children's interests in an initial determination of custody, Mitten is asking this Court to hold that a custodial parent's liberty interest in the care and

supervision of her child is an isolated right that may be exercised without regard to the noncustodial parents or the best interests of her child. The constitutional protection of parental rights should not be extended to essentially preclude any consideration of the protection of the child's interests.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectively submitted,

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IN THE

Supreme Court of the United States

DENISE MITTEN,

Petitioner,

v.

MARK LaCHAPELLE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA COURT OF APPEALS

BRIEF IN OPPOSITION FOR RESPONDENT MARK LaCHAPELLE

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TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Statutory Provisions Involved	1
Statement of the Case	5
Reasons for Denying the Writ	8
I. Mitten's Petition Requests That This Court Regulate An Area Of Law In Which States Have Historically Been Sovereign.	8
II. If Mitten Is Challenging The Constitutionality Of Minn. Stat. § 518.17, She Did Not Properly Make That Challenge At The State Court Level, And Did Not Comply With The Provisions Of Rule 29(4)(c) In Filing Her Petition For A Writ Of Certiorari.	10
III. Mitten Fails To Distinguish Between Initial Custody Determinations And Final Custody Determinations, And Therefore, Misstates The Appropriate Standard For Awarding Custody.	13
Conclusion	19

TABLE OF CITED AUTHORITIES

Page

Cases:

Burgess v. Burgess, 913 P.2d 473 (Cal. 1996) 18

Harder v. Harder, 524 N.W.2d 325 (Neb. 1994) .. 18

Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979) ... 9

In re Burrus, 136 U.S. 586 (1890) 9

In re the Custody of D.M.G. and T.J.G., 951 P.2d 1377 (Mont. 1998) 18, 19

In re the Marriage of Cole, 729 P.2d 1276 (Mont. 1986) 19

In re the Marriage of Francis, 919 P.2d 776 (Colo. 1996) 17, 18

Jaramillo v. Jaramillo, 823 P.2d 299 (N.M. 1991) 17

McAlister v. Patterson, 299 S.E.2d 322 (S.C. 1982) 18

McCarty v. McCarty, 453 U.S. 210 (1981) 9

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928) 12

Cited Authorities

Page

Oxley Stave Co. v. Butler County, 166 U.S. 648 (1897) 12, 13

Rose v. Rose, 481 U.S. 619 (1987) 9

Stevison v. Woods, 560 So. 2d 176 (Miss. 1990) .. 17

United States v. Lopez, 514 U.S. 549 (1995) 8, 9

United States v. Morrison, Nos. 99-5 and 99-29, 2000 WL 574361 (May 15, 2000) 9

Waldner v. Peterson, 447 N.W.2d 217 (Minn. App. 1989) 11

Watts v. Watts, 971 P.2d 608 (Wyo. 1999) 16

Webb v. Webb, 451 U.S. 493 (1981) 11, 12

Younger v. Harris, 401 U.S. 37 (1971) 12

Statutes:

28 U.S.C. § 2403(b) 11

Minn. Stat. § 257.51, *et seq.* 6

Minn. Stat. § 518.17 ..... *passim*

Minn. Stat. § 518.18 ..... 1, 4, 9, 14, 17

Cited Authorities

Page

Minn. Stat. § 518.131 ..... 1, 14

Minn. Stat. § 518.156 6

Rules:

Minn. R. Civ. App. P. 144 11

Minn. R. Civ. P. 24.04 11

United States Supreme Court Rule 29(4)(c) 10, 11

Other Authorities:

Carol S. Burch and Janet M. Bowermaster, *The Relocation of Children and Custodial Parents: Public Policy, Past and Present*, 30 Fam. L.Q. 245 (1996) 16

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Janet Leach Richards, *Children's Rights v. Parent's Rights: A Proposed Solution to the Custodial Relocation Conundrum*, 29 N.M. L. Rev. 24 (1999) 18

STATUTORY PROVISIONS INVOLVED

Denise Mitten's petition to this Court indicates that the Minnesota State statutory provision involved in this case is Minn. Stat. § 518.17, subd. 3(a). However, the statutory provisions that are pertinent to this Court's consideration of Mitten's petition also include Minn. Stat. §§ 518.131, 518.17, subd. (1), and 518.18, subd. (d).

Minn. Stat. § 518.131, provides in pertinent part:

> **518.131 Temporary orders and restraining orders.**
>
> Subdivision 1. In a proceeding brought for custody, dissolution, or legal separation, or for disposition of property, maintenance, or child support following the dissolution of a marriage, either party may, by motion, request from the court and the court may grant a temporary order pending the final disposition of the proceeding to or for:
>
> (a) Temporary custody and visitation rights of the minor children of the parties;
>
> . . .
>
> (h) Restrain one or both parties from removing any minor child of the parties from the jurisdiction of the court;
>
> . . .

Subdivision 7. The court shall be guided by the factors set forth in sections . . . 518.17 to 518.175 (concerning custody and visitation) . . . in making temporary orders and restraining orders.

. . .

Subdivision 9. A temporary order or restraining order:

(a) Shall not prejudice the rights of the parties or the child which are to be adjudicated at subsequent hearings in the proceeding . . .

Minn. Stat. § 518.17, subd. (1), provides as follows:

518.17 Custody and support of children on judgment.

Subdivision 1. **The best interests of the child.** (a) "The best interests of the child" means all relevant factors to be considered and evaluated by the court including:

(1) the wishes of the child's parent or parents as to custody;

(2) the reasonable preference of the child, if the court deems the child to be of sufficient age to express preference;

(3) the child's primary caretaker;

(4) the intimacy of the relationship between each parent and the child;

(5) the interaction and interrelationship of the child with a parent or parents, siblings, and any other person who may significantly affect the child's best interests;

(6) the child's adjustment to home, school, and community;

(7) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;

(8) the permanence, as a family unit, of the existing or proposed custodial home;

(9) the mental and physical health of all individuals involved; except that a disability, as defined in section 363.01, of a proposed custodian or the child shall not be determinative of the custody of the child, unless the proposed custodial arrangement is not in the best interest of the child;

(10) the capacity and disposition of the parties to give the child love, affection, and guidance, and to continue educating and raising the child in the child's culture and religion or creed, if any;

(11) the child's cultural background;

(12) the effect on the child of the actions of an abuser, if related to domestic abuse, as defined in section 518B.01, that has occurred between the parents or between a parent and another individual, whether or not the individual alleged to have committed domestic abuse is or ever was a family or household member of the parent; and

(13) except in cases in which a finding of domestic abuse as defined in section 518B.01, has been made, the disposition of each parent to encourage and permit frequent and continuing contact by the other parent with the child.

The court may not use one factor to the exclusion of all others. The primary caretaker factor may not be used as a presumption in determining the best interests of the child. The court must make detailed findings on each of the factors and explain how the factors led to its conclusions and to the determination of the best interests of the child.

Minn. Stat. § 518.18, subd. (d), provides as follows:

518.18 Modification of order.

. . .

(d) If the court has jurisdiction to determine child custody matters, the court shall not modify a prior custody order unless it finds, upon the

basis of facts, including unwarranted denial of, or interference with, a duly established visitation schedule, that have arisen since the prior order or that were unknown to the court at the time of the prior order, that a change has occurred in the circumstances of the child or the parties and that the modification is necessary to serve the best interests of the child. In applying these standards the court shall retain the custody arrangement established by the prior order unless:

(i) both parties agree to the modification;

(ii) the child has been integrated into the family of the petitioner with the consent of the other party; or

(iii) the child's present environment endangers the child's physical or emotional health or impairs the child's emotional development and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child.

STATEMENT OF THE CASE

Appellant's Statement of the Case is so inaccurate and potentially misleading that respondent must restate the facts in their entirety, so that the Court has an accurate version.

The underlying Minnesota State court proceeding consolidated a Minn. Stat. § 257.51, *et seq.*, paternity proceeding with a Minn. Stat. § 518.156 custody proceeding, involving the three parties. All three parties sought custody and/or visitation of the minor child, L.M.K.O.

Petitioner, Denise Mitten, and respondent, Mark LaChapelle, are L.M.K.O.'s biological parents. Mitten and respondent, Valerie Ohanian, resided together in a committed relationship for several years before L.M.K.O. was born until June 1996. Pursuant to a written "Donor Agreement" dated December 8, 1990, Mitten gave birth to L.M.K.O. on January 4, 1993, having been artificially inseminated with sperm donated by LaChapelle.[1] On May 17, 1992, all three parties (and LaChapelle's life partner) signed another agreement stating that Mitten and Ohanian would have physical and legal custody of the unborn child, and LaChapelle and his partner would be entitled to a "significant relationship" with the child. Mitten is L.M.K.O.'s "Mommy;" Ohanian is her "Mama," and LaChapelle was adjudicated L.M.K.O.'s father.

After L.M.K.O.'s birth, Mitten and Ohanian petitioned the trial court to adopt L.M.K.O., which was granted in September 1993. On the petition, the father of the child was identified as "artificial insemination." The trial court was not informed in the adoption proceeding that the donor was known, or of his identity or the parties' written agreements.

LaChapelle visited L.M.K.O. regularly from her birth through August 1994. Mitten and Ohanian then unilaterally

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1. Contrary to Mitten's Statement of the Facts, LaChapelle did not waive all parental rights; he retained the right to visitation with the minor child.

terminated LaChapelle's contact with L.M.K.O.[2] In September 1994, LaChapelle moved to vacate the adoption, alleging fraud on the court for failure to disclose the parties' agreements. The adoption was vacated in August 1995. At the same time, Mitten was granted temporary custody.

In September 1995, LaChapelle petitioned the trial court for adjudication of paternity of L.M.K.O. In June 1996, Mitten and Ohanian ended their relationship. In August 1996, Mitten moved the trial court for permission to move to Michigan with L.M.K.O. because she had a job offer there. At the same time, Ohanian petitioned for custody of L.M.K.O. The trial court granted Mitten's request, by order dated August 30, 1996, and she and L.M.K.O. moved to Michigan. At the time she was granted permission to move with L.M.K.O. to Michigan, Mitten acknowledged that she was still subject to the trial court's jurisdiction. Ohanian and LaChapelle were later granted visitation four days each month, alternating visits between Minnesota and Michigan.

By order dated June 12, 1997, the trial court adjudicated LaChapelle to be L.M.K.O.'s biological father, and ordered that "interim legal and physical care, custody and control of the minor child" remain with Mitten. In a memorandum attached to that order, the trial court noted that the "prior orders awarding custody to Mitten have been interim orders, pending the outcome of the paternity petition and any evidentiary hearings." The court went on to state that it would "make a determination as to what custody arrangement is in [L.M.K.O.'s] best interest based on the factors listed in Minn. Stat. § 518.17."

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2. Contrary to Mitten's Statement of the Case, the parties did not agree that "it would be best if he stopped visiting with L.M.K.O."

A custody trial was held in February 1999. By order dated June 3, 1999, the trial court determined that pursuant to Minn. Stat. § 518.17, it was in L.M.K.O.'s best interest to reside in the Twin Cities metropolitan area. The trial court further determined that it was in L.M.K.O.'s best interest to remain in Mitten's primary physical custody, if Mitten resided in Minnesota.

REASONS FOR DENYING THE WRIT

I.

MITTEN'S PETITION REQUESTS THAT THIS COURT REGULATE AN AREA OF LAW IN WHICH STATES HAVE HISTORICALLY BEEN SOVEREIGN.

A discussion of the enumerated powers created by the United States Constitution was set forth by this Court in *United States v. Lopez*, 514 U.S. 549 (1995). Quoting James Madison, this Court noted that " '[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.' " *Id.* at 551-52 (citation omitted). The Court went on to say:

> This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (internal quotation marks omitted). "Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the

States and the Federal Government will reduce the risk of tyranny and abuse from either front."

Our dual system of government requires a distinction between what authority is national and what authority is local. *Lopez*, *supra*, at 568. This Court has consistently recognized that " '[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.' " *Rose v. Rose*, 481 U.S. 619, 626 (1987) (quoting *In re Burrus*, 136 U.S. 586, 593-94 (1890)); *McCarty v. McCarty*, 453 U.S. 210, 220 (1981); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979).

Mitten argues that this Court should grant her Petition to "confront the issue of when a state may constitutionally restrict a custodial parent's choice to move and when it may not." The Minnesota State Legislature made that determination by enacting Minn. Stat. §§ 518.17 and 518.18. The Minnesota Court of Appeals also made that determination in its decision in the present case. Mitten criticizes the State of Minnesota for intruding into the "privacy of her familial relationship with L.M.K.O" via its current statutory scheme, yet asks this Court to essentially begin regulating family law. Granting Mitten's request would move toward creating federal family law, and effectively begin obliterating the distinction between national and local authority. This Court has consistently maintained that distinction. *See, e.g.*, *United States v. Morrison*, Nos. 99-5 and 99-29, 2000 WL 574361 (May 15, 2000).

II.

IF MITTEN IS CHALLENGING THE CONSTITUTIONALITY OF MINN. STAT. § 518.17, SHE DID NOT PROPERLY MAKE THAT CHALLENGE AT THE STATE COURT LEVEL, AND DID NOT COMPLY WITH THE PROVISIONS OF RULE 29(4)(c) IN FILING HER PETITION FOR A WRIT OF CERTIORARI.

Mitten argues that she has brought her Petition so that this Court can "determine whether Minnesota violated her constitutional right to travel and by interfering in the choices she made as a parent." In effect, Mitten is arguing that the trial court's determination that it was in L.M.K.O.'s best interest to reside in Minnesota was unconstitutional because it limited Mitten's right to live in the state of her choosing.

Throughout her arguments to the trial court, to the Minnesota Court of Appeals, to the Minnesota Supreme Court, and to this Court, it has never been clear whether Mitten challenges the constitutionality of Minn. Stat. § 518.17 itself, or the trial court's interpretation of Minn. Stat. § 518.17 after considering the facts of this case. Mitten states that she initially raised the issue of whether Minnesota violated her constitutional rights in her brief to the trial court, and then in her brief to the Minnesota Court of Appeals, which the Court of Appeals addressed.

The Minnesota Rules of Civil Procedure direct that: "When the constitutionality of an act of the legislature is drawn in question, . . . the party asserting the unconstitutionality of the act shall notify the attorney general thereof within such time as to afford the attorney general an opportunity to intervene." Therefore, if Mitten was challenging the

constitutionality of Minn. Stat. § 518.17 at the trial court level, she was required to notify the Minnesota State Attorney General. Minn. R. Civ. P. 24.04. *See also Waldner v. Peterson*, 447 N.W.2d 217, 219 (Minn. App. 1989). Mitten provided no such notification. By her own admission, Mitten first raised the constitutionality issue in her brief to the trial court. Raising the issue with the trial court, after trial, does not constitute such timely notice to the Minnesota State Attorney General as to afford the attorney general an opportunity to intervene.

If Mitten was challenging the constitutionality of Minn. Stat. § 518.17 at the state appellate court level, she was also required to notify the Minnesota State Attorney General. Minn. R. Civ. App. P. 144. Mitten provided no such notification.

If Mitten is challenging the constitutionality of Minn. Stat. § 518.17 in her Petition to this Court, Rule 29(4)(c) of the Rules of the Supreme Court of the United States required her to state in her petition that 28 U.S.C. § 2403(b) may apply, and to serve a copy of her Petition on the Minnesota State Attorney General. Mitten's Petition contained no such statement, and there is no indication in the record that she served a copy of her Petition on the Minnesota State Attorney General.

This Court has noted that there are "powerful policy considerations" underlying the requirement that a federal challenge to a state statute or other official act be presented first to the state courts. *Webb v. Webb*, 451 U.S. 493, 500 (1981). This Court discussed those policy considerations as follows:

> . . . although the States are sovereign entities, they are bound along with their officials, including their judges, by the Constitution and the federal statutory law. Principles of comity in our federal system require that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on the federal law, or, if the litigation is wholly private, construing and applying the applicable federal requirements. As the Court has elsewhere observed, this principal of comity requires "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways."

Webb, at 499-500 (quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971)).

In the present case, Mitten's challenge to the constitutionality of Minn. Stat. § 518.17, and/or the trial court's custody determination pursuant to Minn. Stat. § 518.17 was not properly presented at the state level in the manner prescribed by law. "It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb*, *supra*, at 497. *See also New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928); *Oxley Stave Co. v. Butler County*,

166 U.S. 648, 655 (1897). Accordingly, Mitten's petition must be dismissed for lack of jurisdiction.

III.

MITTEN FAILS TO DISTINGUISH BETWEEN INITIAL CUSTODY DETERMINATIONS AND FINAL CUSTODY DETERMINATIONS, AND THEREFORE, MISSTATES THE APPROPRIATE STANDARD FOR AWARDING CUSTODY.

The trial court's determination that it was in L.M.K.O.'s best interest to reside in Minnesota was based on the statutory scheme in which custody determinations are made in Minnesota, *i.e.*, Minn. Stat. § 518.17. Mitten argues that the determination interfered with her right to travel, her right to determine her residence, and her right to determine the upbringing of L.M.K.O. Mitten asserts that the "best interest" standard set forth in Minn. Stat. § 518.17 is vague, speculative, and arbitrary, and as a result, "serves very little purpose." She then argues that the only compelling state interest that should allow a court to interfere with that right is protection of the child from detriment and endangerment.

Mitten's argument is based on a single premise. It assumes that a *final* custody award to Mitten had been made prior to the trial court's June 3, 1999 Order. That premise is incorrect. The language the trial court used is clear. Any orders issued prior to June 3, 1999 constituted *interim* determinations regarding legal and physical custody. (Emphasis added.) The June 3, 1999 Order constituted the trial court's final determination of custody. Until that time, Mitten has been awarded only temporary physical custody.

In reviewing Mitten's Petition, this Court must keep the full statutory scheme in which custody determinations are made in Minnesota. As set forth above, Minn. Stat. § 518.131 allows lower courts to determine parties' *temporary* custody and visitation rights in a custody proceeding. In doing so, the statute allows lower courts to prohibit a party from removing a minor child from the jurisdiction of the court pending a final determination of the parties' respective custody and visitation rights. The statute also mandates lower courts not to prejudice the rights of the parties or the child which are to be adjudicated at subsequent hearings in the proceeding.

In making both temporary and final custody and visitation determinations, lower courts are required to consider the "best interest" factors set forth in Minn. Stat. § 518.17, subd. 1. There are 13 factors which lower courts must consider in making those determinations. Because it is the care and upbringing of a child at issue, those factors appropriately address what is best for *the child*, not the parties.

In considering whether a final custody determination, made according to what is in a child's best interest, should be disturbed after that determination has been made, Minnesota courts are required to apply the "endangerment standard" set forth in Minn. Stat. § 518.18, rather than the "best interest" standard set forth in Minn. Stat. § 518.17. Pursuant to Minn. Stat. § 518.18, subd. (d), lower courts may not modify a prior custody order unless a substantial change in the circumstances has occurred such that "the child's present environment endangers the child's physical or emotional health or impairs the child's emotional development and the harm likely to be caused by a change

of environment is outweighed by the advantage of a change to the child."

In the present case, after reviewing the "best interest" factors as required by Minn. Stat. § 518.17, the trial court awarded Mitten temporary physical custody during the pendency of the lower court proceeding. As statutorily required, the trial court applied the same best interest standard in making its final custody determination after trial. Mitten did not take issue with the best interest standard when she was awarded temporary custody in August 1996, or in June 1997, when the trial court specifically stated that that award of custody was interim. In fact, she agreed that she was still subject to the trial court's jurisdiction at the time she was granted permission to move with L.M.K.O. to Michigan. Only when Mitten did not like the trial court's final custody determination that required L.M.K.O. to reside in Minnesota, did she argue that the trial court should not have applied the best interest standard. Only then did she argue that L.M.K.O.'s temporary custody and residence arrangement should have been changed *only* if it endangered her.

Mitten argues that the best interests of a child is not a sufficient compelling state interest to permit state involvement in a parent's choice of residence, and in this case, even in the process of making an initial custody determination. She argues that the only sufficient compelling state interest to interfere in a parent's decision regarding residence would be protecting a child from abuse or neglect.

Mitten then launches into a discussion of authorities advocating use of the endangerment standard, rather than the best interest standard in child relocation situations. However, a careful reading of the authorities relied on by

Mitten shows that her reliance is misplaced. Mitten fails to differentiate between relocation cases involving initial custody determinations versus subsequent modification of those initial custody determinations.

As an example, Mitten cites *Watts v. Watts*, 971 P.2d 608 (Wyo. 1999). In *Watts*, the Wyoming Supreme Court upheld a custodial parent's right to relocate her residence with the minor children. However, what Mitten omits from her discussion is that the right was upheld after custody had been conclusively adjudicated, based on the children's best interest, in the parties' dissolution decree. *Id.* at 611, 612. The court determined that, in seeking a modification of that custody adjudication, the non-custodial parent had the burden of establishing that a substantial change in circumstances had occurred, and that the effect of a move would be detrimental to the children. *Id.* at 613, 614.

In support of her argument, Mitten also cites Arthur B. LaFrance, *Child Custody and Relocation: A Constitutional Perspective*, 34 U. Louisville J. Fam. 1 (1995-96); and Carol S. Burch and Janet M. Bowermaster, *The Relocation of Children and Custodial Parents: Public Policy, Past and Present*, 30 Fam. L.Q. 245 (1996).

LaFrance criticizes courts' use of the best interest standard when considering a request by a custodial parent to relocate the child's residence, and advocates use of the endangerment standard. However, LaFrance's criticism is made in the context of relocation requests made *after* an initial custody decision has been made. In fact, LaFrance acknowledges the necessity of the best interest standard in making initial custody determinations. *Id.* at 8.

Burch and Bowermaster also advocate for the use of an endangerment standard in relocation cases. Again, as does LaFrance, Burch and Bowermaster advocate for the use of that standard specifically in relocation cases arising *after* an award of permanent custody has been made. In fact, they specifically acknowledge Minnesota's statutory scheme requiring a showing of endangerment before a custodial parent can be prevented from relocating with a minor child, but only after an initial determination of custody has been made. *See* Minn. Stat. § 518.18.[3]

In an effort to further convince this Court to accept review of her Petition, Mitten argues that there is also "conflict among the states" regarding which standard (best interest or endangerment) is applied when a custodial parent seeks to move a child's residence out of state. The mere fact that there is a conflict between states on an area of law that is of uniquely state concern is not a valid reason to review a state court decision.

Again, in her discussion, Mitten fails to distinguish between those relocation cases in which an initial custody determination has already been made, and those that involve a subsequent modification of an initial custody determination. In fact, virtually all of the cases cited by Mitten involve a request to relocate a child's residence after an initial custody determination has been made.[4]

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3. The overriding consideration here, though, is that these scholarly articles are not legal authorities sufficient to justify a request that this Court overrule a state court.

4. Specifically, *Jaramillo v. Jaramillo*, 823 P.2d 299 (N.M. 1991); *Stevison v. Woods*, 560 So. 2d 176 (Miss. 1990); *In re the* (Cont'd)

Only two cases cited by Mitten involve initial custody determinations: *In re the Custody of D.M.G. and T.J.G.*, 951 P.2d 1377 (Mont. 1998), and *Burgess v. Burgess*, 913 P.2d 473 (Cal. 1996). Both those cases support the trial court's and the Minnesota Court of Appeals decisions in the present case.

In *Burgess*, the California Supreme Court held that in an initial custody determination, the proposed relocation of the children by one parent is a necessary consideration in determining what custody arrangement is in the children's best interest. The court's analysis included a discussion distinguishing cases involving an initial custody determination, and those involving a subsequent modification of that determination.

In *D.M.G.*, the unmarried parents of two minor children separated, and the mother then moved out of state with the children. In an initial custody determination, the trial court required the mother to return to Montana if she wanted to maintain custody. On appeal, the Montana Supreme Court concluded that the mother's " 'constitutional right of interstate travel is qualified by the special obligations of

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(Cont'd)
Marriage of Francis, 919 P.2d 776 (Colo. 1996); *Harder v. Harder*, 524 N.W.2d 325 (Neb. 1994); and *McAlister v. Patterson*, 299 S.E.2d 322 (S.C. 1982). Mitten also cites Janet Leach Richards, *Children's Rights v. Parent's Rights: A Proposed Solution to the Custodial Relocation Conundrum*, 29 N.M. L. Rev. 24, 247-251 (1999) for a discussion regarding states' "conflicting" application of the best interests and endangerment standards. However, this article also distinguishes between those relocation cases in which an initial custody determination has already been made, and those that involve a subsequent modification of an initial custody determination.

custody, the state's interest in protecting the best interests of the children and by the competing interests of the non-custodial parent.' " *Id.* at 1383 (quoting *In re the Marriage of Cole*, 729 P.2d 1276, 1280 (Mont. 1986)).

CONCLUSION

For all of the reasons stated above, respondent, Mark LaChapelle, respectfully requests that this Court deny Mitten's petition for a writ of certiorari.

Respectfully submitted,

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Supreme Court, U.S.
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No. 00-299

IN THE

Supreme Court of the United States

DENISE MITTEN,

Petitioner,

v.

MARK LaCHAPELLE, VALERIE OHANIAN
and L.M.K.O.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA COURT OF APPEALS

REPLY BRIEF

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15pp

TABLE OF CONTENTS

	Page
Table Of Cited Authorities	iii
Statement Of Jurisdiction	1
Statement Of The Case	1
Reasons For Granting The Writ	1
I. This Court Protects Citizens From Constitutional Violations Even When They Arise In Cases Governed By State Family Law	1
II. Mitten Does Not Challenge The Constitutionality Of A Minnesota Statute, But Even If She Did, This Court May Still Grant Certiorari	3
A. Mitten does not challenge the constitutionality of a Minnesota statute.	4
B. Respondent's notice argument is moot because Mitten has notified the Minnesota Attorney General of her Petition for Certiorari	4
C. Minnesota's notification requirement does not apply, and even if it did, respondent's waived this argument by not raising it below.	5

Contents

Page

III. Regardless Of What Stage In The Proceedings It Occurs During, States Should Not Dictate A Parent's Residence Absent A Demonstration Of Endangerment To The Child 7

Conclusion 10

TABLE OF CITED AUTHORITIES

Page

Cases:

Ada v. Guam Society of Obst. & Gyn., 506 U.S. 1011 (1992) 6

Correll v. Distinctive Dental Svcs, P.A., 607 N.W.2d 440 (Minn. 2000) 7

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989) 7

Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999) 7

In re Young, 82 F.3d 1407 (8th Cir. 1996), *cert. granted, vacated on other grounds*, 521 U.S. 1114 (1997) 5

Lehman v. Lycoming County Children's Svcs., 458 U.S. 502 (1982) 2

Market v. Behm, 394 N.W.2d 239 (Minn. Ct. App. 1986) 6

Merrill v. Town of Addison, 763 F.2d 80 (2d Cir. 1985) 5, 7

Puffer's Hardware v. Donovan, 742 F.2d 12 (1st Cir. 1984) 5

Shapiro v. Thompson, 394 U.S. 618 (1969) 2

Cited Authorities

	Page
Thiele v. Stich, 425 N.W.2d 580 (Minn. 1988)	7
Tonya K. v. Board of Educ. of City of Chicago, 847 F.2d 1243 (7th Cir. 1988)	5
Troxel v. Granville, __ U.S. __, 120 S. Ct. 2054 (2000)	2
Watt v. Watt, 971 P.2d 608 (1999)	9
Welsh v. Johnson, 508 N.W.2d 212 (Minn. Ct. App. 1993)	6
United States Constitution:	
First Amendment	2
Statute:	
28 U.S.C. § 2403(b)	1, 4
Rules:	
Minn. R. Civ. App. P. 144	3, 6
Minn. R. Civ. P. 24.04	3, 6
United States Supreme Court Rule 29.4(c) ...1, 3, 4, 5, 7	

STATEMENT OF JURISDICTION

To the extent that 28 U.S.C. § 2403(b) may apply, notifications required by Rule 29.4(c) have now been made.

STATEMENT OF THE CASE

Respondents claim to disagree with the facts presented in Denise Mitten's brief. Nonetheless, the disagreements are immaterial to the issue presented for review. In actuality, the parties agree on the material facts. They agree that Mitten was living in Michigan (with court permission) when the trial court entered its order, and they agree that the court awarded Mitten sole physical custody. They also agree that custody was conditioned upon L.M.K.O.'s residence within a seven-county area of Minnesota. In addition, the trial court never held that living in Michigan would endanger L.M.K.O. Beyond this, Mitten acknowledges that the trial court found that residence in Minnesota would be in L.M.K.O.'s best interest. While Mitten may disagree, she does not argue any contrary position.

REASONS FOR GRANTING THE WRIT

Denise Mitten continues to believe that the issue presented is of exceptional national importance because it affects a large number of American families and because it implicates fundamental constitutional rights. Respondents offer nothing to suggest otherwise. Instead, they argue: (1) that this Court should disregard constitutional violations that arise in family law cases; (2) that Mitten has not properly challenged the constitutionality of a Minnesota statue; (3) that Mitten has not shown sufficient conflict between the states; and (4) that, on the merits, the trial court's decision was constitutional. As shown below, these arguments should not dissuade the Court from granting certiorari.

I. This Court Protects Citizens From Constitutional Violations Even When They Arise In Cases Governed By State Family Law

Family law is, and should be, governed by state law. Denise Mitten does not suggest that the Court usurp this function.

However, unlike respondents, she does not believe that the Supreme Court should close its eyes to constitutional violations when they arise in a family law case. In fact, the respondents probably do not believe this either.

Had this case involved rights other than parental rights or the right to travel, it is unlikely that respondents would be making this argument. For example, if the trial court made custody contingent upon Mitten changing her religion, respondents presumably would not argue that Minnesota had the last word on determining whether the order was violative of the First Amendment. The same would be true if the trial court had conditioned custody on Mitten foregoing her right to have more children . . . or on foregoing her right to free speech.[1] Even the respondents would have to concede that the Supreme Court, as the guardian of the constitution, would have a legitimate basis to grant certiorari in these circumstances.[2]

Family law, like other areas of law committed to state control, is not immune from constitutional regulation.[3]

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1. Conceivably, each of these illustrations could be in the "best interest" of a child. For example, a judge could conclude that an impoverished custodial mother would not be able to provide as well for her child if she had more children. Thus, it could be in her child's "best interest" if she was told she could only retain custody if she agreed to forego her right to have more children. Similarly, it might be in a child's best interest if his parent abandoned an unpopular political stand. For instance, the child might be ostracized by other children if the parent spoke out on a politically sensitive issue. Thus, telling the parent to forego the right to free speech, or in the alternative lose custody, could be in the child's "best interest."

2. Indeed, the affect on the parent is no less real because it is accomplished through coercion rather than court order. *Cf.*, *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (". . . any classification which serves to penalize the exercise of that right [to travel], unless shown to be necessary to promote a compelling governmental interest is unconstitutional.")

3. *See Lehman v. Lycoming County Children's Svcs.*, 458 U.S. 502, 512 n.14 (1982) ("The Court has considered constitutional challenges to custody or parental-rights proceedings . . ."); *cf.*, *Troxel v. Granville*, __ U.S. __, 120 S. Ct. 2054 (2000) (examining the constitutionality of a grand parent visitation statute).

In suggesting that it is, LaChapelle's brief incorrectly cites to cases that discuss whether Congress may enact statutes that displace state law in fields traditionally committed to state discretion.[4] He does not cite cases indicating this Court should abstain from addressing situations where a state is accused of regulating traditional state law areas in an unconstitutional manner. The cases he cites are inapposite.

Agreed: family law should be regulated by the states. But in doing so, states are not free to violate the constitution. This Court — not the State of Minnesota — has the final word on interpreting the constitution. Thus, while "[o]ur dual system of government requires a distinction between what authority is national and what authority is local,"[5] our republican form of government does not prevent our country's highest court from finding that a state has acted contrary to the fundamental rights of a citizen.

II. Mitten Does Not Challenge The Constitutionality Of A Minnesota Statute, But Even If She Did, This Court May Still Grant Certiorari

Respondents suggest there is lack of jurisdiction to grant certiorari. Essentially, they claim that because Denise Mitten did not notify Minnesota's attorney general that she challenged the constitutionality of a state statute, the Supreme Court rules[6] and Minnesota law,[7] prevent her from pursuing her claim. This argument lacks merit for several reasons. First, Mitten does not challenge the constitutionality of a Minnesota statute. Furthermore, even if she did, she is not prevented from seeking certiorari since she has now complied with this Court's notification requirement. In addition, the Minnesota court rules cited by respondents are inapplicable, and in any event,

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4. *See* LaChapelle Brf. in Opp. to Pet. for Cert. at 9.
5. *See* LaChapelle Brf. in Opp. to Pet. for Cert. at 9.
6. Sup. Ct. R. 29.4(c).
7. Minn. R. Civ. P. 24.04; Minn. R. Civ. App. P. 144.

respondents waived the right to raise this argument by not raising it below.

A. Mitten does not challenge the constitutionality of a Minnesota statute.

Nothing in the Minnesota statutes cited by respondents permit a court to award conditional custody hinged upon the child and mother's residence. In its opinion, the Minnesota Court of Appeals noted that when the trial court entered its conditional custody order, it was exercising its inherent equitable powers:

> The lack of statutory authority explicitly allowing conditional custody awards does not preclude such an award when it is in the child's best interest. *See DeLa Rosa v. DeLa Rosa*, 309 N.W.2d 755, 758 (Minn. 1981) (in family law cases, the district court has inherent power to grant relief as facts and equities require).[8]

The trial court acted pursuant to its equitable powers. Thus, in challenging the conditional custody order, Mitten was not challenging the constitutionality of a statute. Consequently, since the constitutionality of a statute is not called into question, notice to the Minnesota Attorney General under each of the provisions cited by respondents is unnecessary.

B. Respondent's notice argument is moot because Mitten has notified the Minnesota Attorney General of her Petition for Certiorari

Even if Denise Mitten was challenging the constitutionality of a Minnesota statute, this Court could still grant certiorari. This is true because well-established law says that late notice cures any deficiency. Thus, as shown below, since notice has now been made, respondents' argument is moot.

Sup. Ct. R. 29.4(c) implements 28 U.S.C. § 2403(b). Under that statute, federal courts must notify a state's attorney general anytime the constitutionality of one of its statutes is drawn into question. The purpose of the statute is to allow the state to

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8. Mitten's Pet. for Writ of Cert. at App. A, 17a-18a.

intervene and defend the constitutionality of its statute.[9] Several circuit courts have examined the notice requirement, and each have come to the same conclusion: it is not jurisdictional.[10] As a result, "[a]bsent harm or prejudice to the government's opportunity to present its views," belated notice is sufficient to remedy any technical violation.[11] Mitten has now notified the Minnesota Attorney General that the constitutionality of one of the state's statutes may be drawn into question. This precautionary step satisfies the notice requirement because Minnesota has an opportunity to intervene if it wishes. This notice, albeit late, renders respondent's argument under Sup. Ct. R. 29.4(c) moot.

C. Minnesota's notification requirement does not apply, and even if it did, respondent's waived this argument by not raising it below.

In addition to claiming a violation of Sup. Ct. R. 29.4(c), respondents argue that Mitten should have notified the Minnesota Attorney General that she was challenging the constitutionality of a statute when she appeared before the trial court and Minnesota's appeals court. Yet, despite claiming the benefit of these rules, respondents never explain why they apply or why these issues were not raised below. In reality, the rules are inapplicable, and by not raising these issues at the appropriate time, respondents waived the right to raise them now.

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9. *Cf.*, *Tonya K. v. Board of Educ. of City of Chicago*, 847 F.2d 1243, 1248 (7th Cir. 1988) (discussing the parallel provision requiring notice to the U.S. Attorney General when a federal statute's constitutionality is drawn into question).

10. *Id.* at 1248; *Merrill v. Town of Addison*, 763 F.2d 80, 83 (2d Cir. 1985); *In re Young*, 82 F.3d 1407, 1412 (8th Cir. 1996), *cert. granted, vacated on other grounds*, 521 U.S. 1114 (1997); *Puffer's Hardware v. Donovan*, 742 F.2d 12 (1st Cir. 1984).

11. *Merrill*, 763 F.2d at 83; *Tonya K.*, 847 F.2d at 1248 (stating that "[f]ailure to notify the Attorney General is not a jurisdictional defect. . . , and belated notice satisfies any requirement") (internal citation omitted).

Respondents rely upon two Minnesota court rules. The first requires parties in a trial court proceeding to notify the Minnesota State Attorney General if they challenge the constitutionality of a state statute.[12] The second rule contains the same requirement and applies to appeals.[13] In their briefs, respondents correctly point out that Minnesota courts will not hear constitutional challenges unless the requirements are met.[14] They fail to reveal, however, that the rules only apply to facial challenges.[15] According to the Court of Appeals of Minnesota, "[i]n order to challenge the *prima facie* constitutionality of a Minnesota statute, one must first notify the Attorney General."[16] In the absence of notification, courts will hear as-applied challenges.[17]

Even if Mitten was challenging a statute, she would not be making a facial challenge to it. Rather, she would be alleging that the trial court's conditional custody order under the statute violated her constitutional rights since there was no indication that residing outside of the seven-county area chosen by the judge would endanger L.M.K.O. This would be an "as applied" challenge[18]. Thus, lack of notification would not bar review.

The notice argument is also inappropriately raised. Minnesota courts do not permit parties to raise new arguments on appeal. According to its Supreme Court, "[a] reviewing court

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12. Minn. R. Civ. P. 24.04.

13. Minn. R. Civ. App. P. 144.

14. Ohanian Brf. in Opp. to Pet. for Cert. at 13; LaChapelle Brf. in Opp. to Pet. for Cert. at 10-11.

15. *See Welsh v. Johnson*, 508 N.W.2d 212, 215, n.1 (Minn. Ct. App. 1993); *Market v. Behm*, 394 N.W.2d 239, 243 (Minn. Ct. App. 1986).

16. *Id.*

17. *See id.*; *Welsh*, 508 N.W.2d at 215 n.1.

18. *See Ada v. Guam Society of Obst. & Gyn.*, 506 U.S. 1011 (1992) (Scalia, J. dissenting) (explaining that in an as-applied challenge to a statute "the plaintiff contends that application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional.")

must generally consider only those issues that the record shows were presented and considered by the trial court in deciding the matter before it."[19] Likewise, this Court refuses to hear arguments when the parties failed to raise them below.[20] Neither respondent ever suggested that the lower courts could not consider Mitten's constitutional challenge based upon lack of notice.[21]

In short, respondents' notice argument fails to preclude review. Mitten does not take issue with a Minnesota statute; therefore notification is unnecessary. Furthermore, as a precaution, Mitten has now complied with Sup. Ct. R. 29.4(c), making respondents' argument under this rule moot. In addition, since Mitten does not make a facial challenge to the constitutionality of a statute, the Minnesota court rules cited by respondents are inapplicable. And even if they applied, the argument was waived since neither respondent raised it below. For all these reasons, the notice argument presents no obstacle to granting certiorari.

III. Regardless Of What Stage In The Proceedings It Occurs During, States Should Not Dictate A Parent's Residence Absent A Demonstration Of Endangerment To The Child

Respondents recast Denise Mitten's argument as a challenge to the bedrock family law principle that courts should determine custody awards based upon the child's best interests. This is a misinterpretation of the argument. Mitten challenges the

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19. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (internal quotation and citation omitted); *see Correll v. Distinctive Dental Svcs, P.A.*, 607 N.W.2d 440, 447 n.4 (Minn. 2000).

20. *See, e.g., Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 319 n.3 (1999); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38-39 (1989).

21. Furthermore, since both lower courts found the judge's order constitutional, any alleged lack of proper notice was harmless error at worst. *Cf., Merrill*, 763 F.2d at 83 (pointing out that when a statute is upheld, there is "no practical purpose to be served in remanding") (internal quotation and citation omitted).

propriety of conditioning custody on foregoing constitutional rights. As recognized by the Minnesota appeals court, Mitten questioned the propriety of the trial court's decision to award *conditional* custody.[22] Respondents suggest that residence was but one factor in a multi-faceted initial custody determination. Not true: after awarding custody to Mitten, the judge stated that it would be conditioned upon her living with L.M.K.O. in a seven-county area he chose. In fact, the decision states that "Mitten shall have sole physical custody of [L.M.K.O.] *providing that* Mitten shall relocate to the seven county metropolitan area of the Twin Cities."[23]

Even the trial court recognized that "Mitten has been [L.M.K.O.'s] primary caretaker since she was born."[24] It also appropriately recognized that it was in L.M.K.O.'s best interest to be with Mitten.[25] However, the judge went too far when he then said that Mitten's custody would be contingent upon her raising her daughter in his pre-determined location. Respondents believe this was permissible. But again, they would be hard pressed to make the same argument had the trial court conditioned custody upon giving up some other constitutional right (e.g., freedom of religion, freedom of speech, etc.).

Mitten is not making the broad-based attack on the "best interest" standard that the respondents claim she is. She takes no issue with the fact that a court must determine what is in the best interest of a child when resolving custody disputes.[26] However, having made that determination, a judge crosses a constitutional boundary when he begins telling the custodial parent where to live. These should not be state decisions absent

22. Mitten's Pet. for Writ of Cert. at App. A, 15a-23a.

23. Mitten's Pet. for Writ of Cert. at App. A, 75a (emphasis added).

24. Mitten's Pet. for Writ of Cert. at App. A, 52a.

25. The court acknowledged that LaChapelle, the father, was not seeking custody.

26. Contrary to LaChapelle's suggestion, there is no confusion over the fact that Mitten had temporary custody until the trial court entered its order awarding final custody. LaChapelle Brf. in Opp. to Pet. for Cert. at 13-14.

a showing of endangerment. Whether this occurs during a modification request or initial custody determination is irrelevant.

Respondents fail to offer any rationale for treating a relocation request different than a contingent custody situation. In the latter, a judge tells a parent to move to an area and stay there. In the former, a judge tells a parent to remain in a specific locale. The result is no different, because the parent is confined to living where the state dictates. Because of the lack of difference between these two situations, the case law distinctions offered by respondents are artificial. The result is the same: the parent is forced to choose between a constitutional right and a child. Thus, while respondents try to distinguish cases like Wyoming's *Watt v. Watt*[27] because they involve relocation requests, the distinction they offer provides no real difference. Indeed, the affect on the parent is no less tangible because the condition is imposed during a different stage in the proceedings.

If the Court grants certiorari, the question before it will be whether the trial court's conditional custody scheme is constitutional. Regardless of when it occurs, states impede the right to travel and the right to raise a family when they begin dictating residence. That is what occurred here. Certiorari is warranted.

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27. 971 P.2d 608, 616 (1999).

CONCLUSION

Even respondents must concede that the issue upon which the parties disagree is exceptionally important. Constitutional rights are at issue, and the impact upon American families is great. By accepting this case, the Court will not be "nationalizing" family law. To the contrary, it would be acting within an area in which it is uniquely qualified: interpretation of the United States Constitution. Accordingly, Denise Mitten respectfully asks the Court to grant her petition for writ of certiorari.

Respectfully submitted,

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